RECORD, CASE No. 13,586.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 382.

R. B. HOOPER, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

IN ERROR TO THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

FILED JULY 22, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 2, 1892.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the superior court of the State of California in and for the city and county of San Francisco, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said superior court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of California and R. B. Hooper, wherein was drawn in question the validity of a statute of said State of California on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of such its validity, a manifest error hath happened, to the great damage of the said R. B. Hooper, as by his complaint appears, *that*, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of

2 October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the 25th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

Seal U. S. Circuit Court, Northern Dist. Cal.

L. S. B. SAWYER,
Clerk U. S. Circuit Court, Northern District California.

Allowed this 25th day of February, 1889.

WALTER H. LEVY,
Presiding Judge of the Superior Court of the City and County of San Francisco, State of California.

3 [Endorsed:] No. 5269. Dep. 12. In the superior court, city & county of San Francisco, State of California. R. B. Hooper, plaintiff in error, *vs.* The People of the State of California, defendant in error. Writ of error. Filed Feb. 25, 1889. Wm. A. Davies, clerk, by J. B. Mulcahy, deputy clerk.

4 UNITED STATES OF AMERICA, *ss:*

To the People of the State of California, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the second Monday of Octo-

ber, A. D. 1889, pursuant to a writ of error filed in the clerk's office of the superior court of the State of California in and for the city and county of San Francisco, wherein R. B. Hooper is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error in said writ mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Seal Superior Court, City & County of San Francisco, Cal.

Witness the Honorable Walter H. Levy, presiding judge of the superior court of the State of California in and for the city and county of San Francisco, this 18th day of April, A. D. 1889, and of the Independence of the United States the one hundred and thirteenth.

WALTER H. LEVY,
Presiding Judge of the Superior Court.

5 [Endorsed:] 5269. Original. Filed May 10th, 1889. Wm. A. Davies, clerk, by Bert McNulty, deputy clerk.

STATE OF CALIFORNIA:

Service of the within citation is hereby admitted this 26th day of April, A. D. 1889.

G. A. JOHNSON,
Attorney General of California.
R. W. WATERMAN, *Governor.*

6 UNITED STATES OF AMERICA:

Supreme Court of the United States, October Term, 1889.

R. B. HOOPER, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Defendant in Error.

Assignment of Errors.

7 UNITED STATES OF AMERICA:

Supreme Court of the United States, October Term, 1889.

R. B. HOOPER, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Defendant in Error.
} Assignment of Errors.

On the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the city of Washington, comes the said R. B. Hooper, by his attorney, Milton Andros, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

First. For that the said superior court of the State of California in and for the city and county of San Francisco erred in adjudging that section 439 of the penal code of the State of California, under

which the said plaintiff in error is prosecuted, is not, under the facts as they appear of record herein, repugnant to any of the provisions of the Constitution of the United States, whereas said court should have adjudged that said section of said penal code was and is, under the facts as they appear of record herein, repugnant to the provisions of said Constitution and should, upon that ground, have reversed the judgment of said police judge's court and should
8 have found and adjudged said plaintiff in error not guilty of the offense whereof he stood charged.

Second. For that the said superior court of the State of California in and for the city and county of San Francisco erred in affirming the judgment of police judge's court No. 2 of the said city and county, finding and adjudging the said plaintiff in error guilty of the offense whereof he there stood charged under section 439 of the penal code of the State of California, whereas said superior court should have reversed the judgment and adjudged said plaintiff in error not guilty, because the provisions of said section of the penal code, as applied to the facts as they appear of record herein, were and are repugnant to the provisions of the Constitution of the United States, and more particularly to section one of the fourteenth amendment thereto.

Third. For that said superior court of the State of California in and for the city and county of San Francisco erred in affirming the judgment of said police judge's court No. 2 for the city and county of San Francisco, denying the motion of the said plaintiff in error in arrest of judgment in said cause, whereas the said superior court should have reversed said judgment denying said motion and should have granted said motion in arrest of judgment and should have arrested said judgment, because the provisions of section 439 of the penal code of the State of California, under which said plaintiff in error was prosecuted, as applied to the facts as they appear of record herein, were and are repugnant to the provisions of the Constitution of the United States, and more particularly to section one of
9 the fourteenth amendment thereto.

And the said R. B. Hooper prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he has lost by reason of the said judgment.

R. B. HOOPER,
By his att'y, MILTON ANDROS.

10 UNITED STATES OF AMERICA:

Supreme Court of the United States.

R. B. HOOPER, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Defendants in Error.
} Security on Writ of Error.

Know all men by these presents that we, R. B. Hooper, as principal, and Clinton Folger and John T. Smith, as sureties, all of San

Francisco, California, are held and firmly bound unto the People of the State of California in the sum of three hundred dollars, to be paid to the said People of the State of California; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our heirs and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated this thirteenth day of April, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas the above-named R. B. Hooper hath prosecuted a writ of error to the Supreme Court of the United States to reverse
11 the judgment rendered in the above-entitled action by the superior court of the State of California in and for the city and county of San Francisco:

Now, therefore, the condition of this obligation is such that if the above-named R. B. Hooper shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force.

R. B. HOOPER. [SEAL.]
CLINTON FOLGER. [SEAL.]
JNO. T. SMITH. [SEAL.]

Sealed and delivered in presence of—
SAMUEL ROSENHEIM.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss.:*

Clinton Folger and John T. Smith, the parties whose names are subscribed to the above undertaking as sureties thereto, being severally sworn, each for himself deposes and says that he is a resident of the city and county of San Francisco, State of California, and is worth the sum of three hundred dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

12

CLINTON FOLGER.
JNO. T. SMITH.

Subscribed and sworn to before me this 13th day of April, 1889.
SAMUEL ROSENHEIM,
[NOTARIAL SEAL.] *Notary Public.*

The amount and the form of the foregoing bond and the sufficiency of the sureties thereon are approved by me this 18th day of April, A. D. 1889, and of the Independence of the United States the one hundred and thirteenth.

WALTER H. LEVY,
Presiding Judge of the Superior Court of the State of California in and for the City and County of San Francisco.

(Endorsed:) Filed April 18, 1889. Wm. A. Davies, clerk, by J. B. Mulcahy, deputy clerk.

13 In the Police Judge's Court No. 2 of the City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
R. B. HOOPER.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

Personally appears before me this 29 day of September, A. D. 1888, J. C. L. Wadsworth who on oath makes complaint and deposes and says that on, to wit, the 1st day of April, A. D. 1888, in the city and county of San Francisco, State of California, the crime of misdemeanor (procuring insurance on account of foreign companies that have not complied with the laws of this State) was committed, to wit, by R. B. Hooper, who then and there did procure for a resident of this State insurance from an insurance company not incorporated under the laws of this State, to wit, China Mutual Insurance Company of Boston, said company or its agents not then or there having filed the bond required by the laws of this State relating to insurance, contrary to the form, force, and effect of the statute in such cases made and provided and against the peace and dignity of the people of the State of California; and this complainant upon oath accuses the said R. B. Hooper of having committed the said crime and prays that the said accused may be brought before a magistrate and dealt with according to law.

J. C. L. WADSWORTH.

Res. or place of bus.: Office of ins. com'r, 401 Cal. St., San Francisco.

Subscribed and sworn to before me this 29th day of September, A. D. 1888.

JAMES LAWLER,
Judge of the Police Judge's Court No 2. of the City and County of San Francisco.

(Complaint verified.)

(Endorsed:) Filed Sept. 29th, 1888.

14 [Endorsed:] The People of the State of California *vs.* R. B. Hooper. Complaint. Complainant, J. C. L. Wadsworth. Filed in the police judge's court No. 2 of the city and county of San Francisco this 29 day of Sept., 1888. Louis Kaplan, clerk.

15 *Minute Docket.*

In the Police Judge's Court No. 2 of the City and County of San Francisco, State of California.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, Court-Room of said Court,

TUESDAY, *Nov.* 13, 1888.

In open court.

Present, presiding: Hon. James Lawler, judge of police judge's court No. 2.

THE PEOPLE OF THE STATE OF CALIFORNIA } Charged with
vs. } Misdemeanor.
R. B. HOOPER.

In this action the defendant, personally present, pleads not guilty. The defendant and the people expressly waive trial by jury. The defendant consents to be tried by the court.

The court, after hearing the testimony of R. B. Hooper, finds the defendant guilty as charged and orders that he appear for sentence at 10 o'clock a. m. on Thursday, November 22nd, 1888.

16 *Minute Docket.*

In the Police Judge's Court No. 2 of the City and County of San Francisco, State of California.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, Court-Room of said Court,

THURSDAY, *Nov. 22nd*, 1888.

In open court.

Present, presiding: Hon. James Lawler, judge of police judge's court No. 2.

THE PEOPLE OF THE STATE OF CALIFORNIA } Convicted of
vs. } Misdemeanor.
R. B. HOOPER.

By consent the court orders this action to be continued until Monday, Nov. 26th, 1888.

MONDAY, *November* 26, 1888.

Present: Hon. James Lawler, judge, presiding.

By consent the court orders this action to be continued until Wednesday, Nov. 28, 1888.

17 *Minute Docket.*

In the Police Judge's Court No. 2 of the City and County of San Francisco, State of California.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, Court-Room of said Court, }

WEDNESDAY, *Nov. 28th*, 1888.

In open court.

Present, presiding: Hon. James Lawler, judge of police judge's court No. 2.

THE PEOPLE OF THE STATE OF CALIFORNIA } Convicted of Misdemeanor.
vs.
R. B. HOOPER. }

In this action the defendant personally appears for sentence.

The court renders its judgment:

That whereas the said R. B. Hooper having been duly convicted in this court of the crime of misdemeanor—

It is ordered and adjudged, as a punishment therefor, that the said R. B. Hooper pay a fine of five (5) dollars, and in default of payment thereof that said R. B. Hooper be imprisoned in the city prison of this city and county for the period of twenty-four (24) hours.

(Clerk's certificate.)

18 (Title of Court and Cause.)

Motion for New Trial.

The defendant, R. B. Hooper, moves the court to grant him a new trial on the following grounds:

1st. The verdict is contrary to law.

2nd. That the verdict is contrary to evidence.

3rd. That the defendant should have been found and adjudged not guilty because—

First. For that under the evidence there has been no violation by the defendant of section 439 of the Penal Code of the State of California, under which this proceeding is instituted.

Second. For that the statute, to wit, section 439 of the Penal Code of the State of California, amounts to and is a regulation of commerce between the several States and foreign nations, and is therefore in violation of paragraph 3, section 8, of article 1 of the

19 Constitution of the United States.

Third. For that said section 439 of the Penal Code of the State of California is in violation of the constitutional right of the defendant to transact any business in the State of California which is not opposed to the good morals or health of the community.

Fourth. That the said statute is not a police regulation.

Fifth. For that said statute is in violation of the fourteenth amendment of the Constitution of the United States, which declares: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law."

R. B. HOOPER,
By his attorney, MILTON ANDROS.

Filed November 28th, A. D. 1888.

20 (Title of Court and Cause.)

Motion in Arrest of Judgment.

The defendant, R. B. Hooper, moves the court in arrest of judgment on the ground that there is a substantial defect in the complaint in this:

That it does not state facts sufficient to constitute a cause of action.

R. B. HOOPER,
By his attorney, MILTON ANDROS.

Filed November 28th, 1888.

LOUIS KAPLAN,
Clerk Police Court No. 2.

21 (Title of Court and Cause.)

Notice of Appeal.

The defendant, R. B. Hooper, appeals to the superior court of the city and county of San Francisco, State of California, from the denial of his motion in arrest of judgment, from the denial of his motion for a new trial, and from the final judgment in said action.

R. B. HOOPER,
By his attorney, MILTON ANDROS.

To the prosecuting attorney of the police judge's court No. 2 of the city and county of San Francisco, State of California and to the clerk thereof.

(Endorsed:) Due service made on me of the above notice of appeal by copy thereof this 28th day of November, A. D. 1888. William H. Mott, prosecuting attorney of said court.

(Endorsed:) Filed November 28th, 1888.

22 (Title of Court and Cause.)

Statement of the Case on Appeal.

Be it remembered that on the trial of the above-entitled cause, jury having been waived, the people produced to the court the following evidence:

That the firm of Johnson and Higgins are average adjusters and

insurance brokers residing and having their principal place of business in the city of New York, State of New York.

That as insurance brokers they procure for other persons, of whatever State resident, and on the request of such persons, insurance on ships and vessels, cargoes and freights, from insurance companies not incorporated under the laws of the State of California or doing business therein as provided by the laws of said State.

That they receive from said companies the marine policies
23 issued by said companies so insuring said ships or vessels and deliver them to the party or parties for whom they have procured the same.

That the said firm of Johnson & Higgins at all the times herein mentioned had a place of business in the city and county of San Francisco, State of California, and that the defendant had at all the times herein mentioned charge of said business as the employee and agent of said Johnson and Higgins and not otherwise.

That on the 13th day of March, 1888, C. W. Mott, a resident of the State of California, inquired of said defendant if he, the said defendant, as the agent of Johnson and Higgins, could procure the said Johnson and Higgins to place a certain amount of insurance on the steamer "Alliance," of San Francisco, at a certain named rate of premium; to which said defendant replied he would see what could be done in respect to the same.

That thereupon the said defendant informed Johnson and
24 Higgins of the inquiry of said Mott and requested them to advise him, the said defendant, of what, if anything, they had done or could do in the premises; that in compliance with the said request of the said defendant said Johnson & Higgins telegraphed to said defendant as follows:

"Alliance four thousand dollars, done in American farm," but did not advise said defendant of the name of the company in which said insurance had been placed.

The contents of the telegram above named was communicated by the defendant to said Mott. In April, 1888, said firm of Johnson & Higgins forwarded to the said defendant the policy of the "China Mutual Insurance Company" insuring four thousand dollars on said steamer "Alliance."

Said insurance company not then and there being a company incorporated under the laws of the State of California and not then and there having by itself or its agent filed the bond required
25 by the laws of the said State of California relating to insurance, this policy was delivered by the defendant to said Mott, and thereupon said Mott paid to the said defendant, as agent of Johnson & Higgins, the premium for said insurance. This premium was deposited by the defendant in a bank in San Francisco to the credit of Johnson and Higgins and Johnson & Higgins were duly advised by him that said premium had been collected and the amount deposited in bank to their credit.

All the said verbal acts by said Mott and also of said defendant and all acts of defendant as agent in said procuring were done in the city and county of San Francisco, State of California.

That the same was all the evidence given in the case.

That the court, on due consideration of said evidence, found the defendant guilty as charged and so pronounced its verdict.

26 That thereafter and before judgment on said verdict defendant, by his attorney, moved in arrest of judgment, and the following is a copy of his said motion:

Motion in Arrest of Judgment.

The defendant, R. B. Hooper, moves the court in arrest of judgment on the ground that there is a substantial defect in the complaint in this, that it does not state facts sufficient to constitute a cause of action.

R. B. HOOPER,
By his attorney, MILTON ANDROS.

That the court denied the said motion; to which the defendant duly excepted.

That said defendant then and before judgment moved for a new trial, and the following is a copy of the motion for a new trial:

Motion for a New Trial.

The defendant, R. B. Hooper, moves the court to grant him a new trial on the following grounds:

1st. The verdict is contrary to law.

27 2nd. That the verdict is contrary to evidence.

3rd. That the defendant should have been found and adjudged not guilty because:

First. For that under the evidence there has been no violation by the defendant of section 439 of the Penal Code of the State of California, under which this proceeding is instituted.

Second. For that the statute, to wit, section 439 of the Penal Code of the State of California, amounts to and is a regulation of commerce between the several States and foreign nations, and is therefore in violation of paragraph 3, section 8, of article 1 of the Constitution of the United States.

Third. For that said section 439 of the Penal Code of the State of California is in violation of the constitutional right of the defendant to transact any business in the State of California which

28 is not opposed to the good morals or health of the community.

Fourth. That the said statute is not a police regulation.

Fifth. For that said statute is in violation of the fourteenth amendment of the Constitution of the United States, which declares: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law."

R. B. HOOPER,
By his attorney, MILTON ANDROS.

The said motion was by the court denied, and to the denial said defendant duly excepted.

And the court pronounced judgment on its findings and verdict.

29 The above and foregoing statement is correct and is by me settled and signed this 28th day of November, 1888.

JAMES LAWLER,
Judge of the Police Judge's Court No. 2 of the City and County of San Francisco, State of California.

(Endorsed:) Filed in the police judge's court No. 2 of the city and county of San Francisco Wednesday, November 28, 1888. Louis Kaplan, clerk of police judge's court No. 2.

30 [Endorsed:] In the police judge's court No. 2 of the city and county of San Francisco, State of California. The People of the State of California *vs.* R. B. Hooper. Charge of misdemeanor. (Endorsed:) Filed in the superior court of the city and county of San Francisco this 12th day of December, 1888. Wm. J. Ruddick, clerk, by J. W. Egan, deputy clerk.

31 Appeal from police judge's court.

In the Superior Court, City and County of San Francisco, State of California.

DEC. 17TH, A. D. 1888.

THE PEOPLE OF THE STATE OF CALIFORNIA *vs.* R. B. HOOPER. } Convicted of Misdemeanor (Violating Insurance Laws.)

It is ordered that the above-entitled cause, appealed from the police judge's court of the city and county of San Francisco and filed in the superior court of the city and county of San Francisco, State of California, on the 17th day of December, A. D. 1888, be, and the same is hereby, assigned to Hon. D. J. Murphy, judge department No. 12 of this court, for trial and determination.

JNO. F. FINN,
Presiding Judge of the Superior Court.

32 [Endorsed:] No. 5269. Superior court, city and county of San Francisco, State of California, department No. 12. Appeal from police judge's court. The People of the State of California *vs.* R. B. Hooper. Order assigning cause. Filed in open court Dec. 17, 1888. Wm. J. Ruddick, clerk, by J. M. Duncan, deputy clerk.

33 In the Superior Court, City and County of San Francisco, State of California, Departme-t No. 12.

SATURDAYS, *December the 29th, A. D.* 1888.

Present: Hon. D. J. Murphy, judge.

THE PEOPLE OF THE STATE OF CALIFORNIA } Misdemeanor. An
vs. } Appeal from Po-
R. B. HOOPER. } lice Judge's Court.

Cause submitted upon briefs. Five days each allowed appellant and respondent.

34 STATE OF CALIFORNIA:

In the Superior Court of the State of California in and for the City and County of San Francisco, Department 12.

THE PEOPLE OF THE STATE OF CALIFORNIA }
vs. } Stipulation.
R. B. HOOPER, Defendant. }

It is hereby stipulated and agreed between the respective parties to the above-entitled case as follows:

First. That the said proceeding is prosecuted by the People of the State of California against the said defendant under and pursuant to the provisions of section 139 of the Penal Code of the State of California.

Second. That the defendant, after being adjudged guilty and before sentence, made and filed a motion in arrest of judgment; which said motion duly appears of record herein.

35 Third. That said motion was and is, among other things, based and urged upon the claim of said defendant that said act of the legislature of the State of California, to wit, the said section 139 of the Penal Code of said State, is repugnant to some of the provisions of the Constitution of the United States.

Fourth. That the intent of this stipulation is to remove any question as to the right of the defendant to present and urge in this or any appellate court all such questions with the same force and effect as if the said motion had assigned various causes, and had, among other things, set up each and every objection that may be based upon the Constitution of the United States or upon any alleged want of power on the part of the State of California to enact such a statute as that now sought to be enforced or of the right of

36 the People of the State of California to commence, maintain, and prosecute this proceeding against said defendant.

Fifth. That this stipulation be filed and made a part of the record in said cause.

JAMES D. PAGE,
District Attorney.
MILTON ANDROS,
Att'y for Defendant.

(Endorsed:) Filed February 15, 1889. Wm. A. Davies, clerk, by Edgar Haymond, deputy clerk.

37 In the Superior Court, City and County of San Francisco, State of California, Department No. 12.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
R. B. HOOPER. } Opinion of Court.

In the above-entitled case the judgment of the police court is affirmed upon the ground that the facts, as they appear of record herein, bring the act of the defendant within the true intent and meaning of section 439 of the Penal Code of the State of California, under which the defendant is prosecuted, and that on the facts in this case said act is not repugnant to any of the provisions of the Constitution of the United States.

D. J. MURPHY, *Judge.*

(Endorsed:) Filed February 16, 1889. Wm. A. Davies, clerk, by Edgar Haymond, deputy clerk.

38 In the Superior Court, City and County of San Francisco, State of California, Department No. 12.

SATURDAY, *February the 16th, A. D.* 1889.

Present: Hon. D. J. Murphy, judge.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
R. B. HOOPER. } Misdemeanor Appeal.

The judgment of the lower court was affirmed and the remittitur ordered held for two weeks.

The opinion of the court was filed.

The stipulation was filed as of February 15th, 1889.

39 In the Superior Court, City and County of San Francisco, State of California. Department No. 12.

SATURDAY, *March the 2nd, A. D.* 1889.

Present: Hon. D. J. Murphy, judge.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
R. B. HOOPER. } Misdemeanor Appeal.

The remittitur in this cause was ordered held until further order of the court.

40 In the Superior Court, City and County of San Francisco, State of California, Department No. 12.

R. B. HOOPER, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Defendant in Error. } No. 5269.

I, Wm. A. Davies, county clerk of the city and county of San Francisco and *ex officio* clerk of the superior court for the city and county of San Francisco, State of California, do hereby certify the foregoing to be full, true, and correct copies of the various original papers on appeal and of record from the police judge's court of said city and county and the judgment and opinion of the said superior court rendered therein and now on file and of record in my office in the above-entitled cause; that the same constitutes a full and complete exemplification of the records and proceedings in the said cause and of the whole thereof.

All of which I have caused to be exemplified according to the act of Congress.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 21st day of May, A. D. 1889.

[Seal Superior Court, City & County of San Francisco, Cal.]

WM. A. DAVIES,
County Clerk and ex Officio Clerk of the Superior Court.

I, F. W. Lawler, presiding judge of the superior court of the city and county of San Francisco, State of California, do hereby certify that said court is a court of record, having a clerk and seal; that Wm. A. Davies, who has signed the annexed attestation, is the duly elected and qualified county clerk of the city and county of San Francisco, and was at the time of signing said attestation *ex officio* clerk of said superior court; that said signature is his genuine handwriting, and that all his official acts as such clerk are entitled to full faith and credit.

And I further certify that said attestation is in due form of law.

Witness my hand this 21st day of May, A. D. 1889.

F. W. LAWLER,
Presiding Judge of the said Superior Court.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

I, Wm. A. Davies, county clerk of the city and county of San Francisco and *ex officio* clerk of the superior court of the city and county of San Francisco, State of California, do hereby certify that the Honorable F. W. Lawler, whose name is subscribed to the preceding certificate, is presiding judge of the superior court of the city and county of San Francisco, State of California, duly — and qualified, and that the signature of said judge to said certificate is genuine.

In witness whereof I have hereunto set my hand and affixed the seal of the said court this 21st day of May, A. D. 1889.

[Seal Superior Court, City & County of San Francisco, Cal.]

WM. A. DAVIES,
County Clerk and Clerk of Court.

41 [Endorsed:] No. 5269. In the superior court, city and county of San Francisco, State of California, department No. 12. R. B. Hooper, plaintiff in error, *vs.* The People of the State of California, defendant in error. Exemplification of record.

Endorsed on cover: Case No. 13,586. California superior court, San Francisco city & county. No. 382. R. B. Hooper, plaintiff in error, *vs.* The People of the State of California. Filed July 22, 1889.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1890.

No. 808.

R. B. HOOPER,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

MOTION TO ADVANCE.

Now comes the defendant in error, by counsel, and moves this Honorable Court that the above-entitled cause be advanced and set down for argument at the present term, for the reasons assigned in the attached statement of the Attorney-General of the State of California.

A. T. BRITTON,
A. B. BROWNE,
Attorneys for Defendant in Error.

Should the motion be granted, it is most respectfully suggested that the convenience of distant counsel, who will present the argument, will be met if the cause be assigned for argument late in November or early in December.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 808.

R. B. HOOPER,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

Now comes G. A. Johnson, the Attorney General of the State of California, and in support of the motion to advance this cause, represents to the Court as follows:

Section 439 of the Penal Code of the State of California provides:

"Every person who in this State procures or agrees to procure, any insurance for a resident of this State from any insurance company not incorporated under the laws of this State, unless such company or its agent has filed the bond required by the laws of this State relating to insurance, is guilty of a misdemeanor."

The defendant, R. B. Hooper, was prosecuted and convicted in the Police Court of the city and county of San Francisco for an alleged violation of this section of the Code, and thereupon appealed to to the Superior Court of the City and County of San Francisco, which Court affirmed the judgment of the Police Court. From the said Superior Court a writ of error has been taken to the Supreme Court of the United States, and is now pending in said Court.

It is claimed by the said R. B. Hooper, plaintiff in error, that the provisions of section 439 of the Penal Code of California, as applied to the facts as they appear of record herein,

were and are repugnant to the provisions of the Constitution of the United States, and more particularly to section one of the Fourteenth Amendment. The said Attorney General further represents, on his information and belief, that notwithstanding said conviction, the plaintiff in error has continued to act in violation of said section of the Code, and will continue so to act, upon the alleged ground that the same is unconstitutional; that he believes it is very important to the State of California that the question involved be definitely settled by this Court, as otherwise the foregoing section of the Penal Code of California will be persistently violated with impunity and will become a dead letter, and there is also a paramount necessity for its early decision, as a matter of general interest to the State.

G. A. JOHNSON,
Attorney General of California.

Office Supreme Court U. S.
FILED.
JAN 6 1893
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 57.

R. B. HOOPER,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JNO. E. PARSONS,
Of Counsel.

C. G. Burgoyne, cor. Walker and Centre Streets, N. Y.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892. NO. 57.

R. B. HOOPER,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

Brief for Plaintiff in Error.

ERROR TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

The writ of error was taken in order that there might be brought before this Court the grave constitutional question, as yet undecided, of the right of a State (California) to prevent the effecting of marine insurance in other States by marine insurance companies of other States neither doing business nor having an agency in California, the property insured being a vessel owned in California; and whether this can be accomplished by making penal the action of a citizen of California, who, *for the insured*, receives his application there and transmits it to the foreign State where the insurance is effected and the policy delivered.

It will be seen that the business concerned may be of great importance.

The plaintiff in error has consented to waive an oral argument at the request of the counsel for the defendant in error, who has once attended from California, and desires, if possible, to avoid a second visit; with the proviso, however, that if the Court shall think that there should be an oral argument it is to be asked to assign a future day for the purpose.

Mr. Hooper, the plaintiff in error, was convicted in one of the Police Courts of San Francisco "of the crime of misdemeanor," and was sentenced to fine and imprisonment. He appealed to the Superior Court of the State of California in and for the City and County of San Francisco; (p. 13) the judgment of the Police Court was affirmed by that Court, it being the highest court in the State in which a decision could be had in the matter.

Constitution of California, Art. VI., § 5.
Barbier vs. Connolly, 113 U. S., 27.

A writ of error was taken from its judgment to this Court.

The misdemeanor of which the plaintiff was accused and convicted was that he "did procure for a resident of this State "insurance from an insurance company not incorporated "under the laws of this State, to wit, China Mutual Insurance Com- "pany of Boston, said company or its agents not then or there "having filed the bond required by the laws of this State relating to "insurance companies" (p. 5).

The general statute referred to is to be found in the "Political Code of California," Section 623. It reads as follows:

"The Commissioner [Insurance Commissioner] must require "every company, association or individual not incorporated under "the laws of this State, and proposing to transact insurance business "by agent or agents in this State, before commencing such business, "to file in his office a bond to be signed by the person or firm, "officer or agent as principal, with two sureties to be approved by "the Commissioner, in the penal sum of two thousand dollars for "each insurance company, association, firm or individual for whose "account it is proposed to collect premiums of insurance in this "State, the conditions of such bond to be as follows:

"1. That the person or firm, agent or officer named therein, "acting on behalf of the company, association, firm or individual "named therein, will pay to the treasurer of the county, or city and "county in which the principal office of the agency is located, such "sum per quarter, quarterly in advance, for a license to transact an "insurance business, or such other license as may be imposed by "law as long as the agency remains in the hands of the person or "firm, officer or agent named as principal in the bond.

"2. That the person or firm, officer or agent will pay to the "State all stamp or other duties on the gross amounts insured, in- "clusive of renewals on existing policies.

"3. That the person, firm, agent or corporation named therein "will conform to all the provisions of the revenue and other laws "made to govern them."

The particular statute provision under which the plaintiff was convicted is to be found in Section 649 of the California Penal Code. It reads as follows:

"Every person who in this State procures or agrees to procure "any insurance for a resident of this State from any insurance com- "pany not incorporated under the laws of this State, unless such "company or its agent has filed the bond required by the laws of "this State relative to insurance, is guilty of a misdemeanor."

The record shows that both before the trial Court, by motions for a new trial and in arrest of judgment (pp. 7, 8), and before the Superior Court on the appeal (pp. 10, 12), the point was taken by the plaintiff in error, that the section was repugnant to the Constitution of the United States in that, among other things, it was in violation of his constitutional right to transact any business in the State of California which was not opposed to the good morals or health of the community, that the statute was not a police regulation, and that it violated the commerce provision of and the Fourteenth Amendment to the Constitution of the United States, so far as that declares that "no State shall make or enforce any "law which shall abridge the privileges or immunities of citizens of "the United States, nor shall any State deprive any person of life, "liberty or property without due process of law." In the Superior Court (p. 13) the judgment was affirmed expressly upon the ground that the provision of the penal code in question "is not repugnant "to any of the provisions of the Constitution of the United States;" and its judgment, in this respect, is duly assigned for error.

The evidence upon which the plaintiff in error was convicted is set forth in full in the record (p. 9). It was, briefly, to the effect that Mr. Hooper, the plaintiff in error, was the San Francisco agent of the firm of Johnson & Higgins, who were marine insurance brokers, doing business in the City of New York; that a Mr. Mott, a resident of California, did, upon one occasion, apply to the plaintiff in error at his office in San Francisco to procure Messrs. Johnson & Higgins to place in New York a certain amount of insurance on the steamer Alliance of San Francisco at a certain named rate of premium, the insurance company not being specified; that the agent merely transmitted the application to his principals, Messrs. Johnson & Higgins, in New York; that they there effected the insurance desired with the China Mutual Insurance Company, and sent the policy to the

plaintiff in error; and that he upon its receipt delivered it to the applicant, received from him the premium, and deposited it in a bank of San Francisco to the credit of Messrs. Johnson & Higgins.

FIRST POINT.

The judgment of the Superior Court of California was a final judgment, from which a writ of error lies to this Court.

"Nothing remains to be done but to require the inferior Court (the Police Court) to perform the ministerial act of entering the judgments in that court which have been ordered. This is but carrying the judgment of the Supreme Court [Superior Court] which has been rendered into execution. Nothing is left to the judicial discretion of the Court below."

Mower vs. Fletcher, 114 U. S., 127.

SECOND POINT.

The appeal does not present, nor does the plaintiff in error propose to argue the following positions:

For all the purposes of the argument it may be conceded that the State of California has the right to impose upon a foreign insurance company, as a condition of permitting it to do insurance business within its jurisdiction, such conditions as it sees fit.

It may be granted that it could provide that no contract made in California with a foreign insurance company shall be enforced in favor of the company in any of the courts of the State, or it might enact that no property in California should be insured there against fire by a foreign fire insurance company.

It need not be disputed that it is within the power of the State to tax, even to confiscation, any property of a foreign insurance company which can be found within its borders.

And it may be granted that impositions or restrictions by which the State may prevent a foreign insurance company from doing business in California directly may be made applicable to agents, so that neither the insurance company nor any one representing the insurance company shall do insurance business in the State.

The plaintiff in error does not question the authority of—

Paul vs. Virginia, 8 Wall., 168.
Philadelphia Fire Assn. vs. New York, 119 U. S., 110.
Pembina Mining Co. vs. Pennsylvania, 125 U. S., 181.

and many decisions of State courts, which are in accord with the principles therein laid down.

What the plaintiff in error maintains is that the provision of the California Penal Code under consideration goes one step further than has ever been sanctioned by this Court; or, for the matter of that, by any of the State courts; and that that step crosses the line between that which is and that which is not repugnant to the constitutional provisions concerned.

The material facts, briefly recapitulated, are that the plaintiff in error was in San Francisco requested by Mr. Mott to ask Messrs. Johnson & Higgins in New York to procure him a policy of marine insurance upon his vessel, the Alliance, to the amount of $4,000; that he transmitted the request; and that, at New York, Messrs. Johnson & Higgins effected the insurance, placing it with the China Mutual Insurance Co., which was not a California corporation; that they forwarded the policy to the plaintiff in error in San Francisco, he delivered it to Mr. Mott, and that Mr. Mott reimbursed him the premium, and he placed it to the credit of Messrs. Johnson & Higgins.

The business of Messrs. Johnson & Higgins was carried on in New York. It consisted in procuring insurance from insurance companies for and at the request of their (Messrs. Johnson & Higgins') principals (p. 9).

To bring the case within the Penal Code provision requires that the plaintiff in error should have procured, or have agreed to procure, the insurance for Mr. Mott.

The charge was that he did procure it *for Mr. Mott.*

The decision of the Superior Court was (p. 13) "that, on the facts in this case, said act" (referring to Section 439 of the Penal Code of California) "is not repugnant to any of the provisions of the Constitution of the United States."

It will thus be seen that the question presented is whether by a California Statute Mr. Mott can be deprived of his right to insure in New York a San Francisco vessel of which he is the owner; and whether this can be done by making it a criminal offense for his agent Mr. Hooper to transmit to New York the request.

The plaintiff in error contends:

1. That the provision of the Penal Code violates the Commerce section of the Constitution.

2. That it violates the Fourteenth Amendment.

3. And that it cannot be sustained upon the claim that it comes within the police power of the State.

In considering the subject the plaintiff in error is compelled to acquiesce and he does acquiesce in the construction put by the Superior Court upon the Penal Code provision, *i. e.*, that it covers the facts as they were stipulated, and that upon the facts it does not violate the Constitution.

THIRD POINT.

The Fourteenth Amendment.

The right of the plaintiff in error to pursue any lawful business or vocation is guaranteed him by the Fourteenth Amendment.

Whatever may once have been the state of the law upon this subject, it is not understood that the proposition is now any longer open to doubt.

Powell vs. Pennsylvania, 127 U. S., 678:

By the Court, HARLAN, J.: "The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, is an essential part of his rights of liberty and property as guaranteed by the Fourteenth Amendment. The Court assents to this general proposition as embodying a sound principle of constitutional law."

Butchers' Union Company vs. Crescent City Company, 111 U. S., 746–757:

FIELD, J.: "Common business and callings in life, the ordinary trades and pursuits which are innocuous in this and have been followed in all communities from time immemorial, must therefore be free in this country to all alike upon the same conditions. The right to pursue them without let or hinderance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."

BRADLEY, J.: "I hold that the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States."

People vs. Marx, 99 N. Y., 377–386:

By the Court, RAPALLO, J.: "The Fourteenth Amendment provides [quoting it]. These constitutional safeguards have been so thoroughly discussed in recent cases that it would be superfluous to do more than refer to the conclusions which have been reached bearing upon the question now under consideration. Upon these no proposition is more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit not injurious to the community as he may see fit. The term 'liberty,' as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare."

Matter of Jacobs, 98 N. Y., 98–106:

BY THE COURT, EARL, J.: "Liberty, in its particular sense as understood in this country, means the right not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the Legislature of the police power which will be noticed later), are infringements upon his fundamental rights of liberty which are under constitutional protection."

FOURTH POINT.

The right of Mr. Mott, the insured, *in New York*, to obtain insurance upon his vessel must be conceded. His residence in California could not be availed of by the State to make his doing so penal.

Whatever control of this right the State of New York might have, no such control was possessed by California.

The right of the plaintiff in error to act for Mr. Mott in New York, and for him there to obtain insurance upon his vessel, must also be conceded.

If it was in New York and not in California that the insurance was procured by Mr. Hooper, so far as he can be said to have procured it at all, any statute which permits his conviction of a crime for his part in the transaction, must be unconstitutional.

Now, certainly, when he had transmitted the application to his principals in New York, he had not procured the insurance; for he did not then even know to what company the application would be made.

Nor did he ever in California procure the insurance; for when he next participated in the transaction by receiving and delivering the policy, the insurance had been already procured. It was procured when Messrs. Johnson & Higgins, as agents for the insured, received the policy from the insurance company. The transaction was then complete, and the rights of the assured and the assurer were fixed from that moment. So far as the insurance went, it was immaterial whether the policy was retained by Messrs. Johnson & Higgins, or delivered by them to their principal; they held it as his agents merely, subject only to their lien upon it against him for their advances of the premium. Such is the well-settled rule in all marine insurance cases.

What happened in California had no relation to the procurement of the insurance *there*. What subsequently happened was merely the delivery to the insured of the evidence that the insurance had been effected; and the reimbursement by him of Messrs. Johnson & Higgins for the amount of the premium paid by them, or which they had promised the insurance company would be paid by them. It might have been done equally well through the medium of a local bank, or an express company.

And unless it can be said that, in that case, the express company or the bank, by effecting in San Francisco the exchange of the policy for the check to the order of Johnson & Higgins, would have committed a crime for which the State of California could constitutionally punish them, it cannot be said that it can constitutionally declare what Mr. Hooper did to be a crime, or punish him for it. Without either of these subsequent transactions, the assured in case of a loss could have recovered from the insurance company.

The plaintiff in error, therefore, submits that it was, at most, for procuring in New York insurance upon Mr. Mott's vessel that he was convicted; that it was not within the power of California to prevent either Mr. Mott or Mr. Hooper, his agent, from procuring in New York insurance on Mr. Mott's vessel; and that the California statute under which, as interpreted by the Court below, he has been convicted of a crime for doing this is unconstitutional.

It is equally unconstitutional for the California Statute to make it penal for the plaintiff in error in San Francisco to agree with, or rather to accept the employment of, Mr. Mott to obtain the insurance in New York.

That is really what Mr. Hooper did. It is all that he did in California. The Statute makes that penal.

FIFTH POINT

It does not meet the argument to say that in point of fact it is Mr. Hooper, the agent, and not Mr. Mott, the vessel owner, who has been convicted.

What Mr. Mott could do, the Fourteenth Amendment secured to Mr. Hooper the right to do. What Mr. Hooper could do in New York the Fourteenth Amendment secured his right to do in California.

The question is whether the statute on its face is constitutional; and if on its face it is broad enough to authorize a similar prosecution against the owner, which could not be sustained, it must be condemned even when invoked against the agent.

And that the act does impose its prohibition equally upon both is plain. "Every person who in this State procures * * * insurance for a resident of this State [*i. e.*, even for himself if a resident], &c., is guilty of a misdemeanor."

This applies to all persons.

It cannot be sustained upon any claim that it was intended only to meet the case of persons who were not citizens of the United States.

SIXTH POINT.

The provisions of the Penal Code go far beyond the scope of the provision of the Political Code, to carry which into execution is their professed purpose and sole justification, and far beyond the rightful power of the State of which the Political Code is an exercise.

The provision of the Political Code confines itself within the legitimate scope of the admitted power of the State to prohibit foreign insurance companies from "transacting insurance business by agent or agents in the State." It is only foreign insurance companies who "propose to transact insurance business by agent or agents in the State," who are required to file the bond.

The Penal Code, however, makes it a misdemeanor for any resident of California to procure insurance from any foreign insurance company which has not filed a bond, whether the insurance be effected in San Francisco or in New York, although the company may not propose to have, and may not in fact have, a single "agent in the State," or "transact any business by agents in the State." And it is precisely here that it passes the border line, and transcends the power of the State. So long as the legislation confines itself to preventing foreign corporations from having "agents in the State," or "transacting business in the State," it is legitimate. The moment the legislation goes beyond this, and attacks a foreign corporation which neither has an agent in the State nor "transacts business in the State," the moment it makes dealings with *such* corporations by or on behalf of its citizens outside of the State illegal or criminal, it has ceased to be an exercise of the power to exclude

foreign corporations, and has become a bare and indefensible restraint upon the liberty of its citizens.

There could not be a better illustration of this vital difference than that afforded by the case at bar.

The China Mutual Insurance Company neither maintained nor had an agent in California, nor transacted any business there. It was not even charged in the complaint that the insurance company had an agent in the State, or proposed to, or did, in fact, transact any business by him. On the contrary, not only was the allegation of the complaint itself virtually that Mr. Hooper acted only as the agent of the insured in the matter, but the proof established such to be the fact. It showed that Mr. Hooper forwarded the application for insurance, without even knowing to what company it would be addressed by his principals; that they, acting always "for other persons and at their request," procured the insurance *in New York*, and transmitted the policy to the insured through the medium of Mr. Hooper, in no respect otherwise than they might have done through the medium of an express company or a local bank. The case presents a single isolated instance of an insurance of a vessel by the China Mutual Insurance Company, which was complete when in New York the company delivered the policy to Messrs. Johnson & Higgins, from whom it had received the application. It had no agent in California, and may never before or since have written a single policy on a vessel owned in California. It did not "transact business" "by agents" or otherwise, in that State.

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727, 733:

By the Court. Woods, J.: "So far as appears by the record, the plaintiff had no principal place of business, nor any place of business whatever in the State of Colorado; and the making of the contract set out in the complaint was the only business ever done by it, or that it ever purposed to do in that State. * * *

"The contention of the defendants in error is that the prohibition against the doing of any business in the State by a foreign corporation, except upon the prescribed condition, includes the doing of any single and isolated act of business whatever. Thus broadly stated, it is clear that the interpretation of the defendants cannot be sustained. * * * The obvious construction, therefore, of the Constitution and the statute is that no foreign corporation shall begin any business in the State with the purpose of pursuing or carrying it on until it has filed the certificate, &c. To require such a certificate as a prerequisite to the doing of a single act of busi-

ness when there was no purpose to do any other business or have a place of business in the State would be unreasonable and incongruous."

SEVENTH POINT.

The contention by the plaintiff in error, that the Commerce Section was violated, rests upon the obvious difference between fire insurance, which is necessarily local, the property concerned in which need not be the subject of commerce, and marine insurance upon vessels, which are the most ordinary and necessary vehicles of commerce.

The right to insure vessel and cargo is a more indispensable requisite of the commerce which they effect than the right to communicate by telegram concerning them. Yet, because it was a necessary instrument of commerce, the telegraph has been held to be beyond the power of the State to regulate.

Pensacola Tel. Co. vs. W. U. Tel. Co., 96 U. S., 1.
Telegraph Co. vs. Texas, 105 U. S., 460.
Wabash Ry. Co. vs. Illinois, 118 U. S., 557.
W. U. Tel. Co. vs. Pendleton, 122 U. S., 347.
Leloup vs. Port of Mobile, 127 U. S., 640.

The commerce of San Francisco would easily survive the loss of telegraphic communication with the rest of the world; but it would be paralyzed in a day if the State of California could forbid foreign or domestic corporations thereafter to insure vessels or the cargoes of vessels plying upon the navigable waters of the State.

There is a still more essential distinction on this point between this case and *Paul vs. Virginia*, *Ducat vs. Chicago, et al.* In them the transaction before the Court was the issuing in the State, by a regular, avowed and permanent agent of the company, of a policy of fire insurance on property in the State.

Here the transaction, even as depicted by the State, is an agreement in California to order a policy of insurance to be issued in New York, and the issue and dispatch from New York to San Francisco of the policy ordered. It is as much a commercial transaction

between the two States as if it had been a box of dry-goods that was ordered, shipped and paid for.

Robbins vs. Shelby Co., 120 U. S., 489, 498.

By the Court, BRADLEY, J.: "A New Orleans merchant cannot be taxed there for ordering goods from London or New York; because, in the one case it is an act of foreign, and in the other of interstate commerce, both of which are subject to regulation by Congress alone.

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727.
Asher vs. Texas, 128 U. S., 129.

EIGHTH POINT.

The provision of the California Penal Code cannot be sustained upon any theory that it was within the police power of the State.

The only thing done in California by the plaintiff in error was to receive from Mr. Mott, the insured, a verbal request and to transmit the request to New York. He subsequently received the policy, delivered it to Mr. Mott, and received from him the premium. This he transmitted to New York where the insurance had been effected, and the policy had been delivered to Mr. Mott's agents. By no means can it be successfully claimed that this was opposed to good morals or the welfare of the community.

Minnesota vs. Barber, 136 U. S., 313, 319:

By the Court, HARLAN, J.: "The presumption that this statute was enacted in good faith for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a Legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the Courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. This principle of constitutional interpretation

has been often announced by this Court. In *Henderson, &c., vs. New York, &c.*, 92 U. S., 259, 268, where a statute of New York imposing burdensome and almost impossible conditions on the landing of passengers from vessels employed in foreign commerce, was held to be unconstitutional and void as a regulation of such commerce, the Court said that 'in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' In *People vs. Compagnie Generale Transatlantique*, 107 U. S., 59, 63, where the question was as to the validity of a statute of the same State, which was attempted to be supported as an inspection law authorized by Section 10 of Article 1 of the Constitution, and was so designated in its title, it was said: 'A State cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title.' So, in *Soon Hing vs. Crowley*, 113 U. S., 703, 710: 'The rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments.' In *Mugler vs. Kansas*, 123 U. S. 623, 661, the Court, after observing that every possible presumption is to be indulged in favor of the validity of a statute, said that the judiciary must obey the Constitution rather than the law-making department of the Government, and must, upon its own responsibility, determine whether, in any particular case, the limits of the Constitution have been passed. It was added: 'If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.' Upon the authority of those cases, and others that could be cited, it is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether, by its necessary or natural operation, it impairs or destroys rights secured by the Constitution of the United States."

Mugler vs. Kansas, 123 U. S., 623, 661:

By the Court, HARLAN, J.: "It does not at all follow that every statute enacted ostensibly for the promotion of these ends (the public morals, the public health, or the public safety) is to be accepted as a legitimate exertion of the police powers of the State.

There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute (Sinking Fund Cases, 99 U. S. 700, 718, the) courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in Marbury vs. Madison, 1 Cranch, 137, 176, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority."

In the case at bar, however, the act does not pretend to be an exercise of the police power. Its sole purpose is on its face to secure to the State the annual license fee and other taxes from insurance companies maintaining an agency in the State and doing business there. Such companies the State may, perhaps, assert the power to tax. But it is a wholly different matter to make it a penal offense to deal through the mails and telegraph with insurance companies which do neither maintain agencies nor transact business within the State. Upon such companies there is no legitimate opportunity for the exercise either of the taxing power, or the police power, of the State of California.

Leisy vs. Hardin, 135 U. S., 100, 113:

By the Court, FULLER, C. J. (quoting with approval CATRON and MATTHEWS, JJ.): "To extend the police power over subjects of commerce would be to make commerce subordinate to that power, and would enable the State to bring within the police power 'any article of consumption that a State might wish to exclude, whether it belonged to that which was drunk, or to food and clothing;' and with nearly equal claims to propriety; as malt liquors and the products of fruits other than grapes, stand on no higher ground than the light wines of this and other countries, excluded in effect by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing."

Walling vs. Michigan, 116 U. S., 446, 460:

By the Court, BRADLEY, J.: "The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States Government created thereby."

Mugler vs. Kansas, 123 U. S., 623, 663:

By the Court, HARLAN, J.: "Undoubtedly the State, when providing by legislation for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the General Government."

New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 650:

"*By the Court*, HARLAN, J.: "Definitions of the police power must, however, be taken subject to the condition that the State cannot in its exercise, for any purpose whatever, encroach upon the powers of the General Government, or rights granted or secured by the supreme law of the land. * * * In *Henderson vs. Mayor of New York*, 92 U. S., 259, the Court, speaking by Mr. Justice MILLER, while declining to decide whether in the absence of action by Congress the States can, or how far they may, by appropriate legislation, protect themselves against actual paupers, vagrants, criminals and diseased persons arriving from foreign countries, said that no definition of the police power, and 'no urgency for its use, can authorize a State to exercise it in regard to a subject matter which has been confided exclusively to the discretion of Congress by the Constitution.'"

LASTLY.

The judgment below should be reversed, and the cause remanded with instructions to reverse the judgment of the Police Court and discharge the defendant.

JNO. E. PARSONS,
Of Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
JAN 14 1893
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 57.

October Term, 1892.

R. B. HOOPER,
PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

T. C. VAN NESS,
Of Counsel.

DEV. BRADLEY & CO., PRS., 414 CLAY ST., SAN FRANCISCO.

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

R. B. HOOPER,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

The plaintiff in error was prosecuted upon the complaint of the Insurance Commissioner of the State of California, and convicted in the Police Judge's Court of the City and County of San Francisco, for an alleged violation of Section 439 of the Penal Code of the State of California. Upon appeal to the Superior Court in and for said city and county, the judgment of conviction was affirmed, whereupon the case was brought to this Court for review.

The language of the section upon which the prosecution and conviction were based is as follows:

"Every person who in this State procures, or agrees to procure, any insurance for a resident of this State, from any insurance company not incorporated under the laws of this State, unless such company or its agent has filed the bond required by the laws of this State relating to insurance, is guilty of a misdemeanor."

The bond "required by the laws of the State of California," within the meaning of the section just quoted, is provided for in the Political Code, Sec. 623, which reads as follows:

"The commissioner must require every company, association, or individual, not incorporated under the laws of this State, and proposing to transact insurance business by agent or agents in this State, before commencing such business, to file in his office a bond, to be signed by the person or firm, officer or agent, as principal, with two sureties, to be approved by the commissioner, in the penal sum of two thousand dollars for each in-

surance company, association, firm or individual, for whose account it is proposed to collect premiums of insurance in this State, the conditions of such bonds to be as follows:

"1. That the person or firm, agent or officer, named therein, acting on behalf of the company, association, firm, or individual named therein, will pay to the treasurer of the county, or city and county, in which the principal office of the agency is located, such sum per quarter, quarterly in advance, for a license to transact an insurance business, or such other license as may be imposed by law, so long as the agency remains in the hands of the person or firm, officer or agent, named as principal in the bond.

"2. That the person or firm, officer or agent, will pay to the State all stamp or other duties on the gross amounts insured by them, in the manner and at the time prescribed by law, inclusive of renewals on existing policies.

"3. That the person, firm, agent, or corporation named therein will conform to all the provisions of the revenue and other laws made to govern them."

It was charged and found that the plaintiff in error had procured for a resident of the State insurance from an insurance company not incorporated under the laws of the State, to wit: the China Mutual Insurance Company, of Boston, and which had not filed the bond as required by the State statutes.

The evidence in support of the charge and judgment, as disclosed by the record, was to the effect, that Johnson and Higgins were insurance brokers residing, and having their principal place of business, in New York, and transacting business in California through the plaintiff in error, as their agent; that C. W. Mott, a resident of the State of California, through plaintiff in error, as agent of Johnson and Higgins, sought insurance upon the steamer Alliance, of San Francisco, and the said Johnson and Higgins procured the China Mutual Insurance Company of Boston, a company not incorporated under the laws of California, and which had not filed the bond referred to in section 439 of the Penal Code, to issue a policy upon said steamer to the said Mott, and forwarded said policy to the plaintiff in error to be delivered to the said Mott. The latter in due course received the policy and delivered it to Mott, and was thereafter arrested and prosecuted to conviction.

Argument.

The record discloses that plaintiff in error urged in the State courts that section 439 of the Penal Code was in violation of the Federal Constitution in that:

1. It is in violation of the provisions of the Fourteenth Amendment that, no State shall make or enforce any law which shall abridge the privileges or immunities of a citizen of the United States, nor deprive any person of life, liberty, or property without due process of law.

2. It is in violation of paragraph III, section 8, of article I, concerning the regulation of commerce between the several States and foreign nations.

3. It impairs the right of plaintiff in error to transact any business in the State of California not opposed to the good health or morals of the community.

4. It is not a police regulation.

The last two objections are clearly embraced within the first and second, and, therefore, it will not be necessary to discuss them separately; and that the State statute is not, open to the other objections suggested is demonstrable upon both principle and authority.

The right of a State to prescribe the conditions upon which foreign corporations may be admitted to transact business within its borders has been frequently asserted and uniformly sustained.

Paul vs. *Virginia*, 8 Wall., 168.
Ducat vs. *Chicago*, 10 Wall., 410.
Doyle vs. *Continental Ins. Co.*, 94 U. S., 531.
Fire Association vs. *New York*, 110 *Id.*, 110.
Pembina M. Co. vs. *State*, 125, *Id.*, 181.

The only restriction is that the terms imposed must not be inconsistent with the constitution.

Barron vs. *Burnside*, 121 U. S., 186.

And to the same effect are

Lafayette Ins. Co. vs. *French*, 18 How., 404.
Ducat vs. *Chicago*, 10 Wall., 410.
Ins. Co. vs. *Morse*, 20 Wall., 455.
St. Clair vs. *Cox*, 106 U. S., 350.
Fire Assn. vs. *New York*, 119 *Id.*, 110.

And the power to prohibit the transaction of business within the State by a corporation, or class of corporations, includes the power to punish the violation of such prohibition.

Moses vs. *State*, 65 Miss., 56. (3 So. Rep., 140.)

As was said by the Court in the case last cited:

"As the State may prohibit a foreign insurance company from doing business within its limits, as held in *Paul* vs. *Virginia*, 8 Wall., 169, it must have the right to make its prohibition effective by penal enactments."

It will be observed that the prohibition of the California law reaches every person who procures, or agrees to procure, insurance for a resident from a company not authorized to transact business within the State. Those seeking the insurance as agents of the insured are as much within the statute as those acting for the insurer. It is possible that, correctly construed, the statute while permitting a party acting for himself to deal with an unauthorized company, will not permit the contract to be made through the intermediation of an agent. If such be the true construction of section 439 of the Penal Code, it is a case in which the act of an agent, although authorized, is not the act of a principal. As between the principal and the insurance company the act of the agent would be the act of the principal; but, as between the principal and the agent, the act would be done *by* the agent *for* the principal. Bouvier defines an agent to be "one who undertakes to transact some business, or to manage some affair, *for* another," etc. The act may or may not be done in the name of the principal, but as between the principal and agent it is always *for* the principal. In the case of the statute under discussion the reason of the non-inclusion of the principal (if this be the correct construction), in the sanction of the law, would seem apparent. It is extremely improbable that the principal and the excluded company will come together within the State, except through the mediation of some person acting in the interest of the latter. At the present day competition in all lines of business, and particularly that of insurance, is so sharp that those who have anything to sell do not wait for, but seek the purchaser, and the legislature would be justified in assuming that residents of the State would not go beyond its borders for insurance, unless its procurement was simplified by the immediate presence of agents of the outside company.

That, in the absence of constitutional prohibition, the State has the power to punish criminally the dealing with a corporation forbidden to transact business within the State, and that it may punish either the principal, or agent, to the transaction, or both, is not open to discussion.

Commonwealth vs. *Biddle*, 21 Atl. Rep., 134.

Of course, the State has not the power to punish for an act committed elsewhere than in the State, and I concede the

soundness of the argument of counsel for plaintiff in error, in so far as it concerns this principle; but he is, I submit, wholly wrong in his assumption that the California courts have decided that the procurement of the insurance outside the State would bring the persons procuring it within the penalty of the statute.

The decision of the Court was that plaintiff in error was guilty of the offense charged, to wit: that he did, on the first day of April, A. D. 1888, *in the City and County of San Francisco, State of California*, procure for a resident of the State, insurance from a company not incorporated under the laws of the State. Whether or not the act charged was committed within the City and County of San Francisco, as charged, or elsewhere, was a question of fact, to be determined by the California courts, and their decision that it was committed within the City and County of San Francisco, however erroneous, cannot be reviewed in this proceeding.

Kansas Endowment Ass'n. vs. *Kansas*, 120 U. S., 103.
Arrowsmith vs. *Harmoning*, 118 U. S., 194.
River Bridge Co. vs. *Kansas Pac. Ry. Co.*, 92 U. S., 317.
Boggs vs *Merced M. Co.*, 3 Wall., 304.

And the same is true if the decision of the Court was that, as matter of law, the insurance was procured within the State. As was said by the Court in *Arrowsmith* vs. *Harmoning*, *supra*, a State cannot be deemed guilty of a violation of its constitutional obligations simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision. The Legislature of a State performs its whole duty under the constitution in this particular when it provides a law for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish the parties the necessary constitutional protection. All after that pertains to the courts, and the parties are left to the appropriate remedies for the correction of errors in judicial proceedings.

The California Court was right in its conclusion that plaintiff in error had committed the offense charged within the State of California. It is true that he forwarded the application to his principal in New York, and that they there received the policy and forwarded it to him, to be delivered to the insured. The argument of counsel is that the insurance was *procured* when the policy was issued and delivered to Johnson and Higgins, the principals of plaintiff in error; but the learned counsel gives to the verb *to procure*, as used in the statute, altogether too narrow a meaning. So construed the statute would be powerless to effect the object intended. Nor is the meaning sought to be put upon the verb in harmony with its accepted definition.

As defined by Webster, to procure is "to bring into possession; to cause to accrue, or come into possession of, * * * to bring about; * * * to cause to come; to bring; to attract." The mere issuance of the policy in New York did not bring it into the possession of the insured. The plaintiff in error, resident in California, through his principals in New York, "brought about" the insurance, and through him it was "brought into the possession" of the insured. If he (Hooper) had written directly to the China Mutual Insurance Company for the policy, and upon receiving it back through the mail had delivered it to the insured, it could not be claimed that he had not procured the policy within the meaning of the statute. The argument of counsel to the effect that the policy for Mott took effect when delivered to Johnson and Higgins, to be forwarded to Hooper, and hence *procured* at the moment of such delivery, is unsound. It would, in the case which I have supposed, also have been delivered when mailed; and yet, in that case, as I have said, it would clearly have been procured by Hooper in California. The procurement of the policy contemplated by the statute relates, not to the legal consummation of the contract of insurance, but to the actual agency of the party through whom it is obtained. The intention of the statute is to prevent any person within the State from bringing about for a resident of the State an insurance in a company not authorized to do business therein, and, viewed in this light, reaches just such a case as the one in hand.

If I am right in what has been said, it follows that the judgment of the State Court must be affirmed, unless the State statute is in violation of the provision of the Fourteenth Amendment relied upon, or is an attempted regulation of commerce.

I. The Statute is not in violation of Section 1 of the Fourteenth Amendment.

It must be admitted that if the statute abridged the privileges or immunities of either the China Mutual Insurance Company, or C. W. Mott, the California citizen to whom its policy was issued, or the plaintiff in error, or deprived either the company, Mott, or plaintiff, of liberty or property without due process of law, or denied to any of them the equal protection of the laws, it is void. But it is confidently asserted that it is not open to any of these objections.

(*a.*) *The statute abridges no privilege or immunity of the China Mutual Insurance Company.*

A corporation is not a person "born or naturalized in the

United States," and, therefore, is not a citizen within the meaning of the first clause of the amendment.

Bank vs. *Earle*, 13 Pet., 586.
Paul vs. *Virginia*, 8 Wall., 168.
Liverpool Ins. Co. vs. *Treasurer*, 10 *Id.*, 566.
Ins. Co. vs. *New Orleans*, 1 Woods, 85.

Nor a "person," when operating in a State other than that of its creation.

Fire Association vs. *New York*, 119 U. S., 110.

It may be contended that Section 439 of the Penal Code does not prohibit the procurement of insurance from unauthorized *corporations*, but from *companies* not incorporated, etc., and that the word "company" as used in that section is synonymous with an association of individuals, and that it is not within the power of the State to discriminate against individuals, or associations of individuals.

But the word "company," as used in section 439 of the Penal Code, constructed in the light of section 623 of the Political Code, is synonymous with corporation." In section 623 it is provided that the "commissioner must require every company, association or individual, not incorporated," etc., to do the things in that section specified, while in 439 the word "company" only is used, omitting *associations and individuals*, and thus clearly indicating that the thing which was in the legislative mind was something different from an individual, or association of individuals; in other words, a corporation.

The word "association" is comprehensive of every class of company other than corporations. And that the word "company" as used in section 439 is synonymous with corporation also appears from the context. The prohibition is against the procurement of insurance from companies not incorporated under the laws of California, *i. e.*, those incorporated under the laws of other States or foreign countries. Reading the two sections together (Penal Code 439 and Political Code 623), it is apparent that the legislature intended that all individuals, associations *and* companies (corporations) should, prior to the transaction of insurance business in the State, execute the bond required by section 623, but that it should not be punishable criminally to deal with an individual, or association of individuals, notwithstanding their non-compliance with the statute, but otherwise in the case of *companies*, as contra-distinguished from individuals and associations.

And the underlying reasons for this apparent discrimination makes it still clearer that the word "company," as used in sec-

tion 439, stands for corporation. The State has the power to exclude corporations, or to permit them to transact business within the State upon prescribed conditions, and to enforce compliance with the prohibition, or condition, by penal enactments, but in the case of an individual, or association of individuals, it would not have that power, as such individual or association of individuals, would, as citizens of the United States, have the right to transact insurance business within the State upon the same terms and conditions as residents of the State, and any discrimination, as against them, would be unconstitutional. The legislature evidently had this distinction in mind when sections 623 and 439 were enacted, and hence the studied difference in the phraseology of the two sections.

In order to give to the word "company," as used in section 623, any force at all, it must be held to be synonymous with "corporation," and that it has the same meaning in 439 as in 623 is evident, for it is in the latter that the bond referred to in the former is provided for, and hence the "company" referred to in the former is identical with the "company" (corporation) specified in the latter.

The foregoing reasoning is supported by the rule that where the language of a statute is susceptible of two interpretations that will be adopted which supports the statute.

Baisdere vs. *Citizens Bank*, 29 Am. Dec., 453.
Bloodgood vs. *Mohawk, etc. R. R. Co.*, 31 *Id.*, 313.
Favors vs. *Glass*, 58 *Id.*, 272.
Seals vs. *State*, 63 *Id.*, 487.

And that a statute will not be declared unconstitutional in a doubtful case.

Davis vs. *Helbig*, 92 Am. Dec., 646.
Harrison vs. *State*, 85 *Id.*, 658.
Hoke vs. *Henderson*, 25 *Id.*, 677.
Com. vs. *Erie Ry. Co.*, 4 Am. Rep., 399.

Lastly, as to this, it is to be observed that the term "insurance company," as used in section 439, is to be taken in its ordinary and familiar signification and import.

Parkinson vs. *State*, 74 Am. Dec., 522.
Quigley vs. *Gorham*, 63 *Id.*, 139.
Cummings vs. *Coleman*, 62 *Id.*, 402.

Now, it is common knowledge that, in this country, the business of insurance is carried on exclusively by incorporated companies, and this Court, in effect, so stated in *Liverpool Insurance Co.* vs. *Oliver Treas'r, etc.*, 10 Wall., 566, saying that the

most important part of the business of the country is carried on by corporations, and citing by way of example banking companies, railroad companies, express companies, telegraph companies and *insurance companies*, etc.

But it may be urged that it was incumbent upon the people to prove that the China Mutual Insurance Company was in fact a corporation, and that the record does not disclose such proof, and hence that it does not appear that the offense of plaintiff in error was within the statutory prohibition. The answer to this is that this Court will not pass upon the sufficiency of the evidence to bring the plaintiff in error within the State statute.

It is the province of the State courts exclusively to determine the sufficiency of the pleadings and evidence, and if, in either of these directions, error has been committed, the plaintiff is without remedy. He may have been erroneously convicted, but this Court cannot aid him, as its right of review is confined solely to the determination of the validity or invalidity of the State statute.

Kansas End. Ass'n, vs. *Kansas*, 120 U. S., 103.
Arkansaw vs. *Harmaning*, 118 U. S., 194.
River Bridge Co. vs. *Kansas Pac. Ry. Co.*, 92 U. S., 317.
Boggs vs. *Merced M. Co.*, 3 Wall., 304.

The only purpose for which the record will be examined is to determine the existence of a federal question, and to ascertain the provisions of the particular statute which the State Court has held constitutional as against the objection of appellant.

Craig vs. *Missouri*, 4 Pet., 410.

And it has been held that no federal question arises where the question is as to the construction and not the validity of the State statute.

But if it were within the province of this Court to pass upon the complaint and evidence it would not reach a different conclusion from that arrived at by the State Court. The name of the company—China Mutual Insurance Company of Boston—is indicative of its corporate character and its place of creation, and, in view of the common knowledge that the insurance business in this country is carried on only by corporations, the presumption would be that it was of that class.

Liverpool Ins. Co. vs. *Oliver Treas'r., &c., supra.*

From what has been said it follows that no privilege or immunity of the China Mutual Insurance Company is abridged by the California law. And that it is not deprived of its property without due process of the law nor denied the equal pro-

tection of law, is equally clear. Having no right to transact business within the State it is not, by its exclusion from the right to make contracts of insurance therein, deprived of its property, in any sense, and certainly not without due process of law. As we have seen, it was within the power of the State to pass the law of exclusion, and as the company is within the prohibition of the statute it cannot complain of its enforcement.

Fire Ass'n vs. *New York*, 119 U. S., 110.
Peabina M. Co. vs. *Pennsylvania*, 125 *Id.*, 181.

(b.) *The statute does not, by reason of its operation in this case, abridge any privilege or immunity of Mott for whom the policy was procured, nor of plaintiff in error, whether he acted as the agent of Mott or the company; nor does it deprive either of these persons of property without due process of law, nor deny to either of them the equal protection of the laws.*

The privileges and immunities protected by the statute are those which belong to persons as citizens of the United States and arising out of the nature and essential character of the government, and effect of the amendment is to put citizens of the United States upon the same footing in each State with the citizens thereof; to secure to all persons of the same class, under like circumstances, the same rights, in so far as the same may be affected by State legislation. The protection and enforcement of those rights is with the State, but the amendment compels the enactment of laws having a uniform operation upon all similarly situated.

Paul vs. *Virginia*, 8 Wall., 168.
Slaughter House Cases, 16 Wall., 36.
Re Kemmler, 136 U. S., 436.

And see to the same effect—

Ward vs. *Farwell*, 97 Ill., 593.
Lathrop vs. *Steadman*, 42 Conn., 583.
Pierce vs. *Kimball*, 9 Me., 54 (23 Am. Dec., 537).
Shepherd vs. *Commissioners*, 59 Ga., 535.
State vs. *Callicatt*, 1 Lea., 716.
Fry vs. *State*, 63 Ind., 552.
Cooley Const. Lim., 743–5.

In the light of the cases just cited, it is clear that no privilege or immunity of Mott, the insured, or plaintiff in error, who procured the insurance, has been abridged. They have been deprived of no right enjoyed by any other citizen. The statute does not confer upon any one a right withheld from either. It

forbids all in common from doing that for which plaintiff in error has been convicted.

What has been said meets the other point made that the statute is in violation of the provision against deprivation of property without due process of law. The statute operates upon all alike and hence is not open to the objection.

And the same is to be said in answer to the complaint that the statute operates as a deprivation of the equal protection of the law. All citizens of the United States, equally with all residents of the State, are affected in like manner by the statute.

The State has power to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to so legislate as to increase the industries of the State, develop its resources and add to its wealth and prosperity. Regulations for these purposes may press with more or less weight upon one than another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish fresh ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions.

Barbier vs. *Connoley*, 113 U. S., 27.
Missouri vs. *Lewis*, 101 U. S., 22.
Home Ins. Co. vs. *New York*, 134 U. S., 594.
R. R. Co. vs. *Beckwoith*, 119 U. S., 26.

In closing the discussion upon the objections to the statute based upon the Fourteenth Amendment it is to be observed that there is no unlawful discrimination in the statute in permitting a resident of the State to procure insurance in his own favor from a company not authorized to do business in the State while prohibiting and punishing its procument for him by another. In its operation the law is as broad as the population of the State. Every citizen is affected by it alike and as the State has the right to exclude companies which have not filed the necessary bond it has the right to prohibit its citizens from dealing with such companies. As was said by the Supreme Court of Pennsylvania in *Commonwealth* vs. *Bidelle*, 21 Atl. Rep., 134, the power of the legislature to declare any acts done within the territory of the State unlawful, or criminal, cannot be questioned * * * * nor can there be any doubt of its power to make the insurance of his property in an unauthorized foreign company, by an owner, criminal, if done in the State. And if it may prohibit residents from dealing with such companies in any manner, it may prescribe the mode in, or condition upon, which they may so deal. And in those

cases in which the party procuring the insurance for the resident acts as the agent of the company, it is clearly within the power of the State to punish him

Moses vs. *State*, 65 Miss., 56.

And if he acts for the person for whom it is procured, he stands in the place of that person and is subject to the statutory conditions under which dealings with the unauthorized company may be had. Under this construction the statute permits all residents alike to enter into contracts of insurance with companies within the prohibition of section 839, but prohibits all alike from procuring for others insurance from such companies. In the language of this Court in *Barbier* vs. *Connolly*, *supra*, the statute "operates alike upon all persons * * * * * * * under the same circumstances and conditions." While permitting all alike to deal for themselves, it prohibits all alike from acting for others. And the reason for this legislative, discrimination, if it may be so called, is apparent, for in the nature of things the class of persons who would procure insurance for residents would be those acting in the interest of the company, although possibly cloaking their action under the guise of an agency for those for whom it was procured. It was probably not thought necessary to prohibit those needing insurance from dealing with unauthorized companies because in the absence of intermediaries such dealing would be highly improbable.

2. The Statute is not a Regulation of Commerce.

The term "*commerce*," as used in paragraph 3, section 8, of article I, had not, at the time of the adoption of the constitution, any more than it has now, any technical or peculiar meaning. When used it conveyed to the mind of the unlearned and the learned alike, the same idea. In law, and in common parlance, its meaning is, and always has been, the same. As defined by Webster, commerce consists in (*a*) "the exchange of merchandise on a large scale between different places or communities; extended trade or traffic." (*b*) "Social intercourse; the dealings of one class in society with another; familiarity."

In *Gibbons* vs. *Ogden*, 9 Wheat., 1, in which the construction of the clause of the constitution relied upon in this case was under consideration, this Court said that "the enlightened patriots who framed our constitution and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said," and that the word "commerce," as used in the constitution, was "traffic" and something more—"intercourse, including navigation."

and adds: "All America understands, and has uniformly understood the word "commerce" to comprehend navigation. It was so understood and must have been so understood when the constitution was framed."

In *Paul* vs. *Virginia*, 8 Wall., 168, it was decided that the business of insurance as ordinarily conducted was not commerce, and that a corporation of one State having an agency by which it conducted the business in another State, was not engaged in commerce between the States. "Issuing a policy of insurance," says the Court, "is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper sense of the term. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different States. * * * They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

The doctrine of this case was affirmed in *Liverpool Ins. Co.* vs. *Orleans Trustees, etc.*, 10 Wall., 556, has never been questioned, and is therefore the settled law of this Court.

If the issuance of a policy of insurance is not a commercial transaction, it follows that the procurement thereof is not either, and hence that a statute prohibiting the right to procure such policy, under specified circumstances, is not an interference with, and therefore not a regulation of commerce.

The counsel for plaintiff in error contends that *Paul* vs. *Virginia* is not in point in that the business carried on by the company referred to in that case was *fire* and not *marine* insurance, and it is argued that as marine insurance is one of the means by which commerce is facilitated, any interference with the operations of companies engaged in that business is unconstitutional. But the decision in *Paul* vs. *Virginia* is as applicable to marine as to fire policies.

They are not, as is said by Justice Field in deciding *Paul* vs. *Virginia*, "articles of commerce in any proper sense of the term. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be

shipped or forwarded from one State to another and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration."

A fire policy upon property within the State is as much an instrumentality of commerce as a marine policy upon a ship or merchandise en route to the State. The San Francisco merchant insures his stock of imported merchandise in warehouse and store and in the event of its destruction by fire depends upon the receipt of the insurance thereon to meet his obligations to his foreign creditors and to renew his stock with fresh importations. Take away from a merchant engaged in business in any of the great cities of the Union the opportunity to insure against the risk from fire and *ipso facto* his credit and the volume of business, foreign, interstate and domestic, which he could do would be curtailed. Indirectly the commercial relations between the States and between the several States and foreign countries would be more seriously affected if fire insurance were unobtainable than if marine insurance were entirely prohibited.

Every banking corporation is more or less an instrumentality of commerce in the same sense that a marine insurance company is. Mercantile balances are settled by bank exchanges, and directly and indirectly the larger portion of the world's commerce is carried on through the medium of these institutions. It is clear, however, that the State may determine the conditions upon which a banking corporation shall transact business within its borders, or may prohibit its dealings within the State, and provide by appropriate legislation for the punishment of a violation of the prohibition. And it would seem equally clear that if the State had the power to prohibit the corporation from transacting business within its borders, it may punish any of its citizens for dealing with such corporations when not allowed to do business within those limits. If it may prohibit the whole of a transaction within the State it may certainly prohibit and punish the execution of any part thereof within the State: provided always, of course, that the transaction is not one of a commercial character as defined by the courts.

In the present case the counsel for plaintiff in error assumes that under the California statute the punishment of his client is for what was done in New York. But such is not the case. It is for what he did within the State of California. It is charged and found that it was within the State of California that he procured the insurance for Mott. The Court has given the statute no broader construction than to hold that his participation in the procurement of this insurance was in

effect the procurement of the insurance within the State, and therefore within the penalty of the statute, and whether right or wrong in this is not a question open to review in this tribunal. Of course if a policy of marine insurance is within the constitutional provision an article of commerce—of trade and barter—Hooper was improperly convicted, but if nothing more than a personal contract, completed by the signature and acceptance of the parties, the conviction must stand.

The cases cited by counsel for plaintiff in error in support of his position that a marine policy is an instrumentality of commerce do not sustain his contention. They are to the effect that telegraph and railroad companies in so far as they are carriers of messages or freight between the States are the means whereby commerce is carried on, and hence within the protection of the commercial clause of the constitution. But there is a broad distinction between direct instrumentalities such as telegraph and railroad companies and collateral agreements of indemnity such as insurance contracts, whether marine or fire. The railroad company is a carrier of articles of commerce between the States. It is the direct essential means by which goods are transported from one State to another, and the same is substantially true of the telegraph. It is through this agency that commercial intercourse is effected and commercial contracts consummated. It is, as with the railroad, the direct, and at this day, essential agency through which commercial transactions are possible. But marine insurance contracts are wholly collateral. With or without insurance the ship will sail and in the absence of accident deliver its cargo at destination. The vessel is in no manner aided in its passage by the existence of the insurance. It is only in case of loss of ship that the insurance is to be paid and when paid it may or may not be invested in the substitution of a new for the lost vessel. In a certain sense marine insurance is an aid to commercial ventures, but it is only so in a remote sense, and as I have already pointed out not more so than fire insurance, which is held not to be an instrumentality of commerce within the constitution.

A policy of marine insurance upon a vessel is the counterpart of a policy of fire insurance upon the rolling stock of a railroad. The latter, as we have seen, is not an article of commerce. Why should the former be held to be so?

It is admitted in the brief for plaintiff in error (p. 10) that it is within the power of the State Legislature to prevent foreign corporations from transacting business in the State, but that section 439 of the Penal Code goes beyond this, and makes dealing with a foreign corporation which is not transacting business within the State unlawful. I confess that I am unable to appreciate this reasoning in connection with the case in

hand, nor can I perceive that section 439 of the Penal Code is in any way inconsistent with section 623 of the Political Code, which the counsel admits was within the power of the legislature to enact.

Section 596 of the Political Code provides that "no person or company must transact insurance in this State without first procuring from the Insurance Commissioner a certificate of authority as in this chapter provided, etc. Section 623, which is in this chapter, as we have seen, provides how the certificate of authority is to be obtained. Section 439 of the Penal Code enforces these two sections by prescribing a penalty for their violation. *Upon its face, on the admission of counsel, this legislation is constitutional.* But it is urged that the China Mutual Company did not propose to transact business within the State, had no agent therein, and that a construction of the statute which permits the punishment of a resident of the State for dealing with such a company brings it within the constitutional inhibition. Is this so? If the State may prohibit a corporation from transacting business within the State, may it not punish a resident of the State for dealing within the State with the excluded corporation? I have admitted, and again do so, that the State may not punish one of its residents for dealing outside of the State with the corporation. But to the extent that, within the State, he deals with it he may be punished. The beneficial effect of laws of this character would be dissipated to the four winds if the rule were otherwise. A contract could not be entered into between a foreign insurance corporation and a resident of California without involving to some extent the transaction of business with such corporation within that State whether such corporation had a local representative or not. And if the operation of a law of the character under consideration were dependent upon the existence of local representation of the insurer, the business which the statute seeks to control could be transacted to as great an extent without regulation as if the statute in question had never been enacted. Judged by the results sought to be secured by the enactment, it is of no consequence whether the go-between be the agent of the insurer or the insured; in either case that is accomplished, which it is the policy of the State to prohibit. What is the difference between a case of a person entering into business in California as the agent of all who may desire to effect contracts of insurance with a foreign insurance company and upon their behalf negotiating these contracts and the case of a local agent of a foreign company transacting business in California with the residents of this State upon behalf of his principal? If the business in the one form is lawful and in the other form unlawful, then the

excluded corporation may defeat the policy of the State and pervert the object of its laws by adding the simple proviso to the policy that in all matters relating to the effecting of the insurance, its representative shall be deemed to be the agent of the insured and not the insurer. By this simple arrangement no business would ever be transacted in prohibited territory by the excluded corporation and the State being powerless to prevent its residents through agents, or otherwise, from consummating such contracts, the provisions of the Political Code would come to naught.

The case of *Cooper Mfg. Co.* vs. *Ferguson*, 113 U. S., 727, cited by counsel in this connection, is not in point. In that case it was held that the law of Colorado, prohibiting foreign corporations from transacting business until compliance with certain statutory provisions, had reference only to corporations intending to carry on business generally, and not to the doing of a single act of business. It is not necessary to criticize the correctness of that decision. It was made in a case commenced in the Federal courts, came to this Court upon a certificate of division of opinion, and was properly before it for decision. In the case in hand the California courts have decided that the China Mutual Company was a company not authorized to do business in this State within the purview of section 439 of the Penal Code, and this construction of the statute by the State Court is not open to review in this tribunal. The only question which can be determined in the present proceeding is whether or not the statute inflicting a penalty upon a resident within the State procuring insurance from such a company is unconstitutional.

I respectfully submit that the judgment of the State Court should be affirmed.

T. C. VAN NESS,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 57.

R. B. HOOPER,

Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Defendant in Error.

Reply to Brief for Defendant in Error.

JNO. E. PARSONS,

Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, New York.

IN THE

SUPREME COURT OF THE UNITED STATES.

R. B. HOOPER,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

Reply by Plaintiff in Error to Brief for Defendant In Error.

The very candid and ingenuous brief submitted by Mr. Van Ness for the defendant in error reduces the discussion to a narrow compass.

The case which he puts (his statement of fact, p. 2 of his brief) is that the China Insurance Company of Boston, a company not incorporated under the laws of California, and which had not filed the bond required by the California Penal Code, through Messrs. Johnson & Higgins, by Mr. Hooper the plaintiff in error as their agent, issued the policy upon the Alliance to Mr. Mott, the insured; forwarded the policy to Mr. Hooper to be delivered to Mr. Mott; and that the latter received the policy, and *in San Francisco* (Mr. Van Ness' brief, p. 5) delivered it to Mr. Mott.

In other words, Mr. Van Ness' brief makes Mr. Hooper the agent of the China Insurance Company to effect insurance for that company in California.

He thus brings the case within *Paul vs. Virginia*, 8 Wall, 168, and a long series of other cases to the same effect; and in this manner he strives to avoid what is the real question.

As was stated by the plaintiff in error in his opening brief, he does not dispute the doctrine of those cases. He does not, for one moment, suggest that California may not regulate the business of insurance within its borders, so far as it shall be carried on by foreign insurance companies, or by agents acting for them.

That, however, is far from being the question which the record presents. It must be kept in mind that the facts were fixed by stipulation. It is not open to the defendant in error to claim that the California Court made an erroneous decision upon the facts, and that for that reason a Federal question is not presented. It is upon this claim that Mr. Van Ness relies to deprive the plaintiff in in error of the decision of this Court (his brief p. 5) upon the important question involved.

The decision of the Superior Court was (p. 13) that *on the facts in this case* said act—referring to Section 439 of the California Penal Code—is not repugnant to any of the provisions of the Constitution of the United States. It is this act, as thus construed and enforced by the highest State Court having jurisdiction in the premises, upon which depends the question whether it is, or is not, repugnant to the constitutional objections presented.

Yick Wo vs. Hopkins, 118 U. S., 356, 373, 374.

According to the facts as stipulated the insurance was effected *in New York*. The policy was *there* delivered to Messrs. Johnson & Higgins. They acted for Mr. Hooper. He acted *for* Mr. Mott. That is to say, Messrs. Johnson & Higgins, for Mr. Mott through Mr. Hooper, obtained the insurance, and they did so in New York. The transaction, so far as the China Company was a party, took place in New York. The policy was there delivered to Messrs. Johnson & Higgins. There was, for all practical and legal purposes, a delivery of the policy there to Mr. Mott. The policy might have remained in the possession of Messrs. Johnson & Higgins until a loss occurred. The loss could have been collected without the policy ever coming into the physical possession of Mr. Mott.

Not only by the stipulation did the plaintiff in error act *for* Mr. Mott; this is so, according to the facts as stipulated; but, to bring the case within the application of the section of the Penal Code under consideration, it is necessary that he should have done so. To make that section applicable, it was necessary that Mr. Hooper should be the agent of Mr. Mott. The language is, "every person who * * * *for* a resident of this State procures," etc.

Mr. Van Ness' brief says (p. 6):

"The procurement of the policy contemplated by the statute "relates, not to the legal consummation of the contract by the "insurance company, but to the actual agency of the party through "whom it is obtained. *The intention of the statute is to prevent any "person within the State from bringing about for a resident of the "State an insurance in a company not authorized to do business "therein.*"

This is an avowal that the object and effect of the statute is to make it penal for Mr. Hooper, in California, to become the agent of Mr. Mott, a resident of California, to obtain marine insurance in New York.

Mr. Van Ness says (p. 6):

"If he (Hooper) had written directly to the China Mutual Insurance Company for the policy, and upon receiving it back through the mail had delivered it to the insured, it could not be claimed that he had not procured the policy within the meaning of the statute."

The hypothesis differs from the facts in the essential respect. If Mr. Hooper, being employed for Mr. Mott, in California, had come to New York, there procured the policy, taken it back to San Francisco and there delivered it to Mr. Mott, there would have been presented a case which would come nearer to the facts as stipulated.

The laws and constitutions of the States and of the United States permit legislation the purpose and effect of which is to prevent foreign insurance companies from doing business in the State, either directly or through an agent who is employed for them. They do not permit legislation which interferes with the personal right of a citizen of a State to do business out of the State with a foreign insurance company.

I do not believe that the Constitution of the United States sanctions legislation which makes it penal for a resident of California, either personally or through an agent in California, to write to an insurance company doing business in New York, having no place of business, no agent, and transacting no business in California, for a policy of marine insurance upon a vessel which happens to be in San Francisco. That, however, is not the question which the record presents. That is not the case to which the section of the California Penal Code applies.

Mr. Hooper, according to the facts as stipulated, acted *for* Mr. Mott. The section in question of the Penal Code requires that he should be the agent of Mr. Mott.

Whether it is the personal rights, as protected by the Constitution of the United States, of Mr. Mott, or of Mr. Hooper, in either case the section of the Penal Code is in violation of Constitutional immunities.

Since the brief for the plaintiff in error was prepared, attention has been called to the cases of

People vs. Gillson, 109 N. Y., 389;
Frorer vs. People, 31 N. E. Reporter, 395;
Ramsey vs. People, 32 N. E. Reporter, 364;

where statutes similar to the one under consideration were held to be in violation of State Constitutional provisions prohibiting laws depriving "any person of life, liberty or property without due process of law."

The Fourteenth Amendment to the Constitution of the United States secures not only that protection to the rights of citizens; it, in direct terms, prohibits any law "which shall abridge their privileges or immunities."

In *People vs. Gillson*, the Court of Appeals of New York, says:

"It cannot be truthfully maintained that this legislation does "not seriously infringe upon the liberty of the owner or dealer in "food products to pursue a lawful calling in a proper manner, or "that it does not, to some extent at least, deprive a person of his "property by curtailing his power of sale, and unless this infringe-"ment and deprivation are reasonably necessary for the common "welfare, or may be said to fairly tend in that direction, or to that "result, the legislation is invalid, as plainly violative of the consti-"tutional provision under discussion.

"This brings us to the consideration of the question whether the "act is valid as a proper exercise of what is, by way of classifica-"tion, called the police power of the State. That power has never "yet been fully described, nor its extent plainly limited; further, at "least, than this: it is not above the Constitution, but it is bounded "by its provisions; and, if any liberty or franchise is expressly pro-"tected by any constitutional provision, it cannot be destroyed by "any valid exercise by the Legislature or the Executive of the "police power. The extent of this power has been the subject of "discussion in this Court; and, in the recent and most important "case of *In re Jacobs* (98 N. Y., 107), the question was examined

" and most exhaustively reviewed by EARL, J., in his opinion. To " reopen the subject now would be useless, and I refer to that case " as authority for the statement that the Legislature cannot, with- " out reason, and arbitrarily, infringe upon the liberty or the prop- " erty rights of any person within the protection of the Constitution " of this State, and that, if the Legislature shall determine what is " the proper exercise of its police power, its decision is subject to " the scrutiny of the Courts. The subject was again reviewed in " *The People vs. Marx* (99 N. Y., 377), in an opinion written by " RAPALLO, J., and concurred in by the whole Court."

In *Frorer vs. People* the Supreme Court of Illinois says:

" If the General Assembly may thus deprive some persons of sub- " stantial privileges allowed to other persons under precisely the " same conditions, it is manifest that it may, upon like principle, " deprive still other persons of other privileges in contracting which, " under precisely the same circumstances, are enjoyed by all but the " prohibited class; and it can hardly be admissible that the legis- " lative determination that the facts are such as to warrant this dis- " crimination is conclusive, for that would make the General Assembly " omnipotent, since, if that were so, there could be nothing but its own " discretion to control its action in regard to every liberty enjoyed " by the citizen; and it might find that the public welfare required " that society should be divided into an indefinite number of classes, " each possessing or being denied privileges in contracting and ac- " quiring property as favoritism or caprice might dictate. The " privilege of contracting is both a liberty and a property right, and " if A is denied the right to contract and acquire property in a " manner which he has hitherto enjoyed under the law, and " which B, C and D are still allowed by the law to enjoy, " it is clear that he is deprived of both liberty and " property to the extent that he is thus denied the " right to contract. Our Constitution guarantees that no person " shall be deprived of his life, liberty or property without due proc- " ess of law (section 2, Art. 2), and says Cooley: 'The man or the " class forbidden the acquisition or enjoyment of property in " the manner permitted, the community at large would be de- " prived of liberty in particulars of primary importance to his or " their pursuit of happiness.' Cooley, Const. Lim. (1st Ed.), p. 393; " People vs. Gillson, 109 N. Y., 398; People vs. Otis, 90 N. Y., 48. " 'Due process of law' does not mean a statute passed for the pur- " pose of working the wrong. Cooley, Const. Lim. (1st Ed.), p. 353. " These words are held to be synonymous with the words: 'law of " the land.' *Id.*, pp. 352, 353. 'And this means general public law, " 'binding upon all the members of the community, under all circum- " 'stances, and not partial or private laws, affecting the rights of pri- " 'vate individuals or classes of individuals.' Millett vs. People, *infra*, " and authorities there cited. It is not doubted that laws may be en-

"acted properly, and without infringing this section of the Constitu-
"tion, which by reason of some peculiar circumstances may affect some
"persons or classes of persons only who were not before affected by
"such restrictions; but, in such instances, the circumstances must
"be so exceptional as to leave no others affected in precisely the
"same way, upon whom a general law could have effect. As we
"quoted from Cooley, Const. Lim., in Millett vs. People, 117 Ill.,
"294, 7 N. E. Rep. 631, 'distinctions in these respects should be
"based upon some reason which renders them important, like the
"want of capacity in infants and insane persons; but if the Legis-
"lature should undertake to provide that persons following some
"specific lawful trade or employment should not have capacity to
"make contracts, or to receive conveyances, or to build such houses
"as others were allowed to erect, or in any other way to make
"such use of their property as was permissible to others,
"it can scarcely be doubted that the act would
"transcend the due bounds of legislative power, even if
"it did not come in conflict with express constitutional provisions.
"The man or the class forbidden the acquisition or enjoyment of
"property in the manner permitted to the community at large,
"would be deprived of liberty in particulars of primary importance
"to his or their pursuit of happiness.' Cooley, Const. Lim. (1st
"Ed.), page 391. And upon this principle we held in Millett vs.
"People, supra, that it is not competent under the Constitution for
"the general assembly to single out owners and operators of coal
"mines, and provide that 'they shall bear burdens not imposed on
"other owners of property or employers of labor, and prohibit them
"from making contracts which it is competent for other owners of
"property, or employers of labor, to make. In State vs. Goodwill,
"33 W. Va., 179, 10 S. E. Rep., 285, and in State vs. Fire Creek,
"etc., Coal Co., 33 W. Va., 188, 10 S. E. Rep., 288, the question
"before the Supreme Court was whether a statute of West Virginia,
"declaring 'that it shall not be lawful for any person, firm, com-
"pany, corporation, or association engaged in mining coal, ore, or
"other minerals, or mining and manufacturing them or either of
"them, or manufacturing iron and steel, or both, or any other kind
"of manufacturing * * * to issue for the payment of labor
"any order or other paper whatsoever, unless the same purports to
"be redeemable for its face value in lawful money of the United
"States, bearing interest at a legal rate made payable to employee
"or bearer, and redeemable within a period of thirty days by the
"person, firm, company, corporation or association giving, making
"or issuing the same.' The Court held, after a lengthy and able
"discussion of the question, that the enactment was unconstitu-
"tional and void. The Court, among other things, said: 'The
"property which every man has in his own labor, as it is the origi-
"nal foundation of all other property, so it is the most sacred and
"inviolable. The patrimony of the poor man lies in the strength
"and dexterity of his own hands; and to hinder him from em-

"ploying these in what manner he may think proper, with-
"out injury to his neighbor, is a plain violation of this
"most sacred property. It is equally an encroachment
"both upon the just liberty and rights of the workman and his em-
"ployer, or those who might be disposed to employ him, for the
"Legislature to interfere with the freedom of contract between
"them, as such interference hinders the one from working at what
"he thinks proper, and at the same time prevents the other from em-
"ploying whom he chooses. A person under the protection of this
"Government has the right to adopt and follow any lawful industrial
"pursuit, not injurious to the community, which he may see fit. And
"as incident to this is the right to labor or employ labor, make con-
"tracts in respect thereto upon such terms as may be agreed upon
"by the parties, to enforce all lawful contracts, to sue and
"give evidence, and to inherit, purchase, lease, sell or
"convey property of every kind. The enjoyment or dep-
"rivation of these rights and privileges constitutes the essential
"distinction between freedom and slavery; between liberty and
"oppression.' There was like ruling in regard to a similar enact-
"ment by the Supreme Court of Pennsylvania in Godcharles vs.
"Wigeman, 113 Pa. St., 431, 6 Atl. Rep., 354. In Com. vs. Perry,
"(Mass.) 28 N. E. Rep., 1026, the defendant was indicted under a
"statute of Massachusetts providing that 'no employer shall im-
"pose a fine upon, or withhold wages or any part of the wages of an
"employee at weaving for imperfections that may arise during the
"process of weaving;' and the Court held the statute unconsti-
"tutional, and in doing so said: 'There are certain fundamental
"rights of every citizen, which are recognized in the organic law
"of all our free American States. A statute which violates any of
"these rights is unconstitutional and void, even though the enactment
"of it is not expressly forbidden. * * * The right to acquire,
"possess, and protect property includes the right to make
"reasonable contracts, which shall be under the protection of the
"law. The manufacture of cloth is an important industry, essential
"to the welfare of the community. There is no reason—indeed, the
"statute before us recognizes it—why men should not be permitted
"to engage in it as a legitimate business, into which anybody may
"freely enter. The right to employ weavers and to make proper
"contracts with them is therefore protected by our Constitution;
"and a statute which forbids the making of such contracts, or
"attempts to nullify them, or impair the obligation of them, violates
"fundamental principles of right which are expressly recognized by
"our Constitution.' See also to like effect, People vs. Marx, 99 N.
"Y., 377, 2 N. E. Rep., 29; *In re* Jacobs, 98 N. Y., 98; *Ex parte*
"Kuback, 85 Cal., 274; 24 Pac. Rep., 737."

In *Ramsey vs. People*, the same Court says:

"We are of the opinion that the same rule, in substance, laid

"down in the Frorer Case applies here, and we need therefore do "little more than refer to what is said in the opinion in that case. "The statute now before us, in like manner with the one under "consideration there, attempts to take from both employer and em- "ployee engaged in the mining business the right and power of "fixing by contract the manner in which such wages are to "be ascertained. The statute makes it imperative, where the "miner is paid on the basis of the amount of coal mined, "whatever may be the wishes or interests of the parties, "that the coal shall be weighed on the pit cars before "being screened, and that the compensation shall be computed "upon the weight of the unscreened coal. In all other kinds of "business involving the employment of labor the employer and "employee are left free to fix by contract the amount of wages to "be paid, and the mode in which such wages shall be ascertained "and computed. This is justly regarded as a very important right, "vitally affecting the interests of both parties. To the extent to "which it is abridged a property right is taken away. There is "nothing in the business of coal mining which renders either the "employer or the employee less capable of contracting in respect to "wages than in any of the other numerous branches of business in "which laborers are employed under analogous conditions. There "is no difference, at least in kind, so far as this matter is "concerned, between coal mining on the one hand, and "other varieties of mining, quarrying stone, grading and construct- "ing railroads, and their operation, when constructed, manufacturing "in all its departments, the construction of buildings, agriculture, "commerce, domestic service, and an almost infinite variety of other "avocations requiring the employment of laborers, on the other "hand. Upon what principle, then, can those engaged in coal "mining be singled out, and subjected to restrictions of their power "to contract as to wages, while those engaged in all these other "classes of business are left entirely free to contract as they see fit? "We think the attempt of the Legislature to impose such restrict- "tions is clearly repugnant to the constitutional limitation above "referred to, and therefore void."

The case presents the clean, direct question whether California has the right to make it penal for Mr. Mott, the insured, or for Mr. Hooper, his agent, to procure, through agents in New York employed by them, marine insurance at New York.

It is confidently submitted that to sanction the California statute in question requires that the Court shall go infinitely beyond what has ever been held, and shall make a decision which is in conflict with well-settled principles of constitutional protection and personal right.

JOHN E. PARSONS,
For Plaintiff in Error.

Office Supreme Court U. S.
FILED.
OCT 10 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

R. B. HOOPER,
PLAINTIFF IN ERROR,
v.
THE PEOPLE OF THE STATE OF CALIFORNIA,
DEFENDANTS IN ERROR.

No. 17.

Supplemental and Additional Points and Authorities upon Behalf of Defendants in Error.

T. C. VAN NESS,
Of Counsel for Defendants in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1893.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

R. B. HOOPER, PLAINTIFF IN ERROR,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, DEFENDANTS IN ERROR. } *No.* 17.

Supplemental and Additional Points and Authorities upon Behalf of Defendants in Error.

In my brief for defendants in error, filed at the last term, I sought to demonstrate that the act of the California legislature, the constitutionality of which is questioned, was not in violation of the fourteenth amendment and was not a regulation of commerce. It is my present purpose to reinforce the argument already made with a few additional suggestions and authorities.

I.

The Act is not in Violation of the Fourteenth Amendment.

It may be admitted that no State has the power to so legislate as to prevent any of its citizens from earning his

livelihood in any of the usual and ordinary occupations of civilized life, and that legislation having that effect would be an abridgment of the privileges and immunities guaranteed by the Constitution. The language of the judges quoted by Mr. Parsons from *Minnesota* v. *Barber* (136 U. S. 319), *Mugler* v. *Kansas* (123 *id.* 661), *Leisy* v. *Hardin* (135 *id.* 113), *Walling* v. *Michigan* (116 *id.* 460), and *New Orleans Gas Co.* v. *Louisiana Light Co.* (115 *id.* 650) is to this effect.

But it is equally true that legislation which is within the power of the State generally, or is in the legitimate exercise of its police power, will be sustained, notwithstanding the fact that indirectly it may, in particular instances, interfere with the carrying on of a business otherwise legitimate. For instance, it is certainly the right of every person to secure insurance against possible loss from fire, or indemnity to his family, in the form of life insurance, in case of his death, but the State under its general power to prohibit foreign fire or life insurance companies from transacting business within the State may make void any contract entered into with a company not licensed to do business within the State, and may punish one of its citizens for dealing within the State with such company. This is substantially admitted by Mr. Parsons, and is directly held in the cases cited in my brief heretofore filed, to wit:

Paul *v.* Virginia, 8 Wall. 168.
Moses *v.* State, 65 Miss. 56.
Commonwealth *v.* Biddle, 21 Atl. Rep. 134.

The right to acquire and possess property is constitutionally guaranteed, and yet the State may by appropriate legislation prescribe that title shall only pass by written instrument, executed with certain formalities,

and a deed taken in violation of the statute would give no right.

Again, the State may lawfully prescribe the age at which contracts may be entered into, and that any contract attempted prior to arrival at such age shall be void.

So, also, if the act of the State legislature be within the reserved police power of the State, the mere fact that its enforcement will restrict or interfere with the carrying on of a business otherwise lawful, and enjoyed of common right, will not bring the enactment within the constitutional prohibition against the abridgment of privileges and immunities. Illustrations of this principle abound in the decisions of this Court.

The butchering of cattle for food purposes is an occupation as old as the human race, but State regulation of this business does not abridge any privilege or immunity of the citizen.

Slaughter-House Cases, 16 Wall. 36.

The right to carry on commerce between the States is one common to all the citizens of the United States, and one which has been guarded by this Court with jealous care; yet even this right may be indirectly affected and restricted by the operation of a State statute passed pursuant to the reserved police power.

Willson *v.* Blackbird Creek Co., 2 Pet. 245.

The laundrying of clothes is an occupation open, as of common right, to all persons, and not only harmless in itself, but of vital necessity in every civilized community. But even-handed legislation under the police power, regulating and controlling this class of business, does not abridge any privilege or immunity of the citizen.

Barbier *v.* Connolly, 113 U. S. 27.

As was said by this Court in the case last cited:

"Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects all persons similarly situated, is not within the amendment."

Possibly counsel for plaintiff in error does not intend to controvert the propositions thus far stated, but relies upon his argument to the effect (*a*) that the act for which his client was prosecuted was committed in the State of New York and hence was one not within the power of the State of California to punish, and that, as the court has construed the statute as giving power to punish for an act done in New York, it is void, and (*b*) that the prohibition of the statute is not within the police power of the State. To these positions I answer (*a*) that the act for which plaintiff in error was prosecuted was committed within the State of California; (*b*) that the statute is within the police power of the State.

II.

The Act for which Plaintiff in Error was prosecuted was committed within the State of California.

Johnson & Higgins had a place of business in the city of San Francisco, where they carried on their business as

insurance brokers through Mr. Hooper as their local agent (Record, p. 9). It was to Johnson & Higgins, in San Francisco, through Mr. Hooper, their agent at that point, that the application for insurance in a foreign company was made; it was in San Francisco that Mr. Hooper, as agent for Johnson & Higgins, received the policy, and it was at that point that the policy was finally accepted and the premium paid (Record, p. 9). It was certainly *through* Mr. Hooper that the insurance was procured, no matter when the contract *as between the parties* took effect.

Johnson & Higgins did not procure the policy as the agent of Mr. Mott, but as independent brokers engaged in the insurance business. In a contest between the China Mutual Insurance Company and Mott, it might be held that Johnson & Higgins were the agents of Mott, but, as between Mott and Johnson & Higgins, the latter were independent brokers—intermediaries between persons seeking and those selling insurance. They were no more the agents of persons applying to them to secure insurance in a foreign company than would be a commission merchant in New York dealing in California wines who, upon application for a given variety of wine, should write to California therefor, advance the price to the grower, receive back the wine, and upon delivery to the customer collect the amount by him advanced.

Mr. Parsons, in one portion of his argument, seems to admit that if the contract was not consummated in New York, but was finally completed in California, the ruling of the State court would be right, and the statute, in such a case, not void. If this Court shall adopt that view of the case the plaintiff in error is out of court.

The transaction between the parties as detailed in the record (p. 9) is that Mott inquired of Hooper if he could

procure Johnson & Higgins to place the insurance on the "Alliance," to which Hooper replied that he would see what could be done. Hooper wrote to J. & H. to ascertain and advise him what could be done, whereupon J. & H. wired "Alliance four thousand dollars in American form," but not naming the company in which the insurance would be taken, nor the amount of premium which would be charged, and neither of these facts was communicated to Mott until the policy and bill for premium were presented.

It is perfectly clear that until the rate of premium was assented to and the policy in the China Mutual Co. accepted there was no completed contract, and that upon the facts disclosed Mott could not have been compelled to take the contract offered him.

It would seem, therefore, that even upon the theory of plaintiff in error the contract of insurance was completed, and hence that the insurance was procured within the State of California.

But is hoped that the Court will not place its decision upon this ground, but will adopt the reasoning of my original brief to the effect that the receipt of the application by Hooper and procurement of the insurance by and through his agency was a procurement within the State within the meaning of the statute. To narrow the law further than this would certainly tend most seriously to defeat its purpose.

Whatever the Court may hold as to the place at which the contract as between the parties was consummated, it should not, I respectfully submit, invalidate the statute, because it may reach a conclusion of law upon the facts at variance with that of the State court. The limitation of the sanction of the statute *to insurance procured in the State* is perfectly plain, and if it shall be held that the

lower court erred in holding that this particular insurance was procured within the State it is evident that the error was one relating to the law of contract, and not of constitutional construction. This proposition is discussed in my brief filed last term and need not be further noticed.

III.

The California Statute is within the Police Power of the State.

Counsel for plaintiff in error seeks to invalidate the statute under which his client was prosecuted upon the ground that it is an interference with his right to carry on a legitimate business not within the police power of the State.

I think that I have in my brief heretofore filed, and substantially again under subdivision I of this supplemental brief, demonstrated that the act under consideration is sustainable as the necessary complement of the legislation of the State prohibiting the transaction of business within the State by foreign corporations not authorized to do business within the State. It cannot be said that a citizen has any right, as such, while in and within the State, to deal with a corporation which is by law forbidden to do business in the State. The right to punish the citizen under such circumstances would seem to result necessarily from the right to exclude the corporation, and the cases heretofore cited, I submit, sustain this contention.

But, independently of the proposition last stated, the act *is* within the police power of the State.

Almost all, if not all, the States have laws prescribing upon what conditions insurance companies generally may

do business, and upon what terms foreign companies may transact this class of business within the State. Insurance commissioners with plenary powers of examination into the affairs of the companies are appointed; annual, and in some cases semi-annual, financial statements are required, and it is generally provided that upon ascertainment and report by the commissioners of impairment of capital the right to do business shall cease. In some of the States a deposit is required from foreign companies to secure policy-holders in the State. It is also quite common to provide that, as a condition to the transaction of insurance business within the State, an attorney for the company shall be appointed, upon whom service of summons may be made, &c. The Political Code of California, secs. 594 to 634, is quite explicit in all the particulars above suggested, and in many others of like import.

The bond required by sec. 623 of the Political Code, and which by sec. 439 of the Penal Code the foreign company must give before it can obtain authority to transact business in the State, *is conditioned for the performance of all the sections of the code relating to insurance companies and their government* (Pol. Code, sec. 623, sub. 3).

It will thus be seen that the object of the bond is to secure compliance upon the part of the foreign company with all the laws relating to foreign companies. The object of these laws is evident. It is to protect the citizens of the State from insurance in untrustworthy or insolvent companies; protection against careless and unbusinesslike methods; against imposition and fraud. Clearly such legislation is within the police power of the State, which this Court has said extends, among other things, "to the protection of the lives, health, and property of the citizens" (*Beer Co.* v. *Massachusetts*, 97 *U. S.* 25 (33)) and warrants such legislation as will increase "the

industries of the State, develop its resources, and add to its wealth and prosperity." (*Barbier* v. *Connolly*, 113 U. S. 27 (31).)

Authorities heretofore cited under subdivision I of this supplemental brief fully sustain our position that if the act be within the police power of the State fairly exercised, the right to carry on a particular business within the State must yield to the exigency of the statute, however lawful the business may otherwise be.

IV.

The Statute is not a Regulation of Commerce.

(*a*) In my brief heretofore filed the point was made that the constitutional prohibition against the regulation of commerce was not violated by State legislation, otherwise valid, which only indirectly affected commercial transactions. I now cite in support of that contention and the validity of the California statute *Sherlock et al.* v. *Alling*, 93 *U. S.* 99.

In *Hall* v. *De Cuir* (95 *U. S.* 485) the Court speaking of State legislation in violation of the commercial clause, referring to the difficulty of determining in all cases the line of demarcation between valid and invalid State legislation, recognizes the proposition last stated, saying (p. 488): "But we think it may safely be said that State legislation which seeks to impose a *direct* burden upon interstate commerce, or to interfere *directly* with its freedom, *does* encroach upon the exclusive power of Congress." (The italics are mine.)

(*b*) Even if it be held that a policy of marine insurance is an instrument of commerce and subject to Congressional control, it is sufficient for the purposes of this case

to say that Congress has never legislated upon the subject of marine policies, and until such legislation the States may act in so far as may be necessary for the protection of its citizens.

Crandall *v.* State of Nevada, 6 Wall. 35.

(*c*) The statute complained of is, as has been shown, within the police power of the State and hence valid, although, it may be, indirectly, having relation, in this case, to a commercial transaction. Some of the authorities in support of this position are cited in subdivision I of this supplemental brief. To these may be added—

New York *v.* Miln, 11 Pet. 102.

Railroad Co. *v.* Fuller, 17 Wall. 560.

Patterson *v.* Kentucky, 97 U. S. 501.

In the case last cited the Court, speaking, through Mr. Justice Harlan, of the cases in which the Court has upheld the commercial clause of the Constitution, and of those in which it has upheld the police power of the State, says:

"This Court has never hesitated, by the most rigid rules of construction, to guard the commercial power of Congress against encroachment in the form or under the guise of State regulation, established with the purpose and for the effect of destroying or impairing rights secured by the Constitution. It has nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding State police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens."

I submit, in conclusion, that the State of California owes it to her citizens by appropriate legislation to protect

them from the evils arising from insurance in unsound insurance companies; that the legislation which plaintiff in error challenges as unconstitutional is appropriate to this end; that only indirectly and in the most remote manner has it any relation to the commerce of the country, and that within the text and spirit of the decisions of this Court it is constitutional.

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Office Supreme Court U. S.
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JAMES H. McKENNEY,
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Supreme Court of the United States.

OCTOBER TERM, 1894.

R. B. HOOPER,
PLAINTIFF IN ERROR,
v.
THE PEOPLE OF THE STATE OF CALIFORNIA.
} *No.* 7.

Memorandum of Additional Authorities Submitted for Defendant in Error.

Policy of Insurance not a Transaction Involving Interstate Commerce.

Nathan v. *Louisiana*, 8 How. 73.
State of Louisiana v. *Williams*, 23 Ins. Law Journal, 609.
Queen Insurance Co. v. *State of Texas*, 24 S. W. Rep. 397.

California Statute Constitutional.

Biddle on Insurance, vol. 1, par. 95, recites as follows: There is no doubt that a State may impose a penalty on

one who acts as agent of a foreign company which has not complied with the statute as to such a company.

Pierce v. *People*, 106 Ill. 11.

Moses v. *State*, 65 Miss. 56.

In Missouri it was expressly decided that the statutes of that State visited the penalties on the agents and not on the companies.

See *Wagner's Stat.*, secs. 30, 36, 41, 52, pp. 749, 751, 753, 755.

State v. *N. Y. L. Ins. Co.*, 81 Mo. 89.

State v. *Charter Oak Life Ins. Co.*, 9 Mo. Ap. 364.

Under the code of Tennessee, secs. 25–65, an agent for foreign company who illegally acts renders himself personally liable for the loss.

Morton v. *Hart*, 88 Tenn. 427.

The question as to what description of agent such act is intended to refer to is often a question of difficulty. The Illinois act, which ran—"The term 'agent' or "'agents' used in this section shall include an acknowl- "edged agent, surveyor, broker, or other person or per- "sons who shall in any manner aid in transacting the "business of any insurance company," applies to every one who acts in the capacity of agent for a foreign insurer with its approval.

Continental Ins. Co. v. *Ruckman*, 127 Ill. 364.

And any one is held to be an agent who aids the insurer in procuring for the insured a policy.

People v. *People's Insurance Exchange*, 126 Ill. 466.

The words of the Massachusetts statute (Gen. Stat., c.

58, secs. 72, 74), that "no person shall act as agent of an "insurance company not incorporated in this State, until "he has complied," etc., etc., under a penalty of a fine, were held to apply not only to agents who act under a general and formed appointment, but also to one who may be employed in a single transaction.

Hart Live-Stock Ins. Co. v. *Matthews*, 102 Mass. 221. See *Roche* v. *Ladd*, 1 Allen (Mass.), in reference to a prior statute.

In Mississippi, under the Code of 1880, section 1085, providing that one "who shall examine into or adjust "or aid in adjusting any loss for or on behalf of any such "insurance company shall be held the agent of such com-"pany," an adjustor was held liable.

Moses v. *State*, 65 Miss. 56.

In Pennsylvania the act of January 24, 1849, was held not to apply to transient agents merely sent to invite applications.

Thornton v. *West. Reserve Farmers' Ins. Co.*, 31 Pa. St. 529.

And the statutes of April 26, 1887, and of April 4, 1873, prohibiting persons from "paying, receiving, or forward-"ing any premiums, applications for insurance, or in any "manner securing, helping, or aiding in the placing of any "insurance," were held to apply to those persons who professionally engage in that business as brokers and agents and not property-owners who occasionally insure.

Commonwealth v. *Biddle*, 139 Pa. St. 605.

The Texas act of 1879 was held to include a soliciting agent.

Smith v. *State*, 18 Tex. Ap. 69.

And the Wisconsin act of 1871, secs. 1 and 3, c. 13, also includes a soliciting agent; and where one represents several companies, soliciting for each was held to be a separate offence, though the solicitor had made a single contract with the insured to place the various risks on his property.

State v. *Farmer*, 49 Wis. 459.

On a suit by the insurer on a note, evidence of the plaintiff to show the agent's fraud to induce the insurance is also good to show a non-compliance with the statutes as to foreign companies by the insurer.

Wash. Co. Mut. Ins. Co. v. *Dawes*, 6 Gray (Mass.), 376.

The fact as to whether one is an agent is under the court's instructions for the jury.

People v. *People's Ins. Exchange*, 126 Ill. 466.

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